# In the Supreme Court of the United States.

OCTOBER TERM, 1902.

MARIANO F. SENA, APPELLANT,
*v.*
UNITED STATES. } No. 40.

JOSE DE LEYBA GRANT.

*APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This suit, which was instituted in the court below on September 29, 1899, was for the purpose of securing the confirmation of what is called the Jose de Leyba grant, alleged to contain about 18,000 acres of land, situate in the county of Santa Fe, Territory of New Mexico.

Subsequently, it having been ascertained by the representatives of the Government that there were a number of persons holding portions of the tract sued for, under claim of title adverse to the grant, a motion was filed by the United States praying an order of

court requiring that these adverse possessors and claimants be made parties defendant and served with process and copy of the petition, as required by section 6 of the land-court act.

Plaintiff confessed said motion to the extent of filing on December 19, 1899, an amended petition reiterating the allegations of the original petition, setting up as adverse possessors and claimants the parties named in the Government's motion and making them parties defendant. Two of these parties, the American Turquoise Company and J. P. McNulty, joined with the United States in defending against the cause, both upon the pleadings and at the trial. (R., 3–4.)

The material allegations of the petition, as amended, were as follows:

That plaintiff is the owner of that certian grant and tract of land lying and being situate in the county of Santa Fe, in the Territory of New Mexico, known and called by the name of the "Jose de Leyba grant," and bounded and described as follows: On the east by the San Marcos road; on the south by an arroyo called Cuesta del Oregano; on the west by the lands of Juan Garcia de las Rivas; and on the north by the lands of Capt. Sebastian de Vargas.

That said tract of land was granted to Jose de Leyba by the then king of Spain, by Governor and Captain-General Juan Domingo de Bustamante, on the 25th day of May, in the year of our Lord 1728, and the grant papers of the same are in the form of an absolute and perfect grant, the original papers of which said

grant are now on file in the office of the surveyor-general of the Territory of New Mexico, and are not in the power, possession, or control of petitioner, said original papers being identified as "Archive No. 441."

That said land has never been officially surveyed, and petitioner does not know the area thereof, but he has filed with his original petition herein a sketch map of the same, showing approximately, according to the best information which he can obtain, the shape of said land and its location, as far as possible, but the exact area and location and shape can not be ascertained until a survey thereof can be made.

That petitioner claims said land by conveyance from the heirs and assigns of the original grantee.

That since the filing of his original petition herein, he has been informed that the owners of Los Cerrillos grant, the same being a confirmed grant and numbered 78 on the docket of this court, J. P. McNulty, L. B. Prince, Thomas Whalen, Samuel Brimagen, Thomas Moore, jr., Diego Mares, Bernard Carrol, Oto Seigler, Albert Ceyer, M. J. O'Niel, Pedro Muniz, and the American Turquoise Company, claim adverse possession to the real estate included within the said Jose de Leyba grant otherwise than by the lease or permission of petitioner, and he therefore makes said parties and company parties defendant to this amended petition, and asks that proper process issue for service on them.

That said claim to said land has not been confirmed, nor has it been considered or acted upon by Congress or any other authorities constituted by law for the

adjustment of land titles in the limits of said Territory of New Mexico as acquired.

On April 6, 1900, the United States filed its answer (R., 8–9), putting generally in issue the allegations of the petition, specifically denying that the grant claimed was situate as set forth in plaintiff's petition, alleging that if any such grant was made the same was located in a manner very different from that set forth in the petition and accompanying sketch map, and covered no portion of the premises included in said petition and sketch map, and further pleading the statute of limitations on the ground that the claim as made was not a perfect and complete title at the date of the treaty, and not having been filed within two years from March 3, 1891, as provided by section 12 of the land court act, became and was abandoned and forever barred at the expiration of said two years. The separate answers of the defendants, McNulty and the American Turquoise Company, is found, Record, 4–5, and separate answer of certain other defendants is found, Record, 9–10.

The cause came on for hearing on April 30, 1900, and was finally submitted on May 4, 1900.

At the hearing claimant presented as his original muniment of title archive No. 441, from the office of the surveyor-general of New Mexico. The reception of this document was objected to on the general grounds of immateriality, irrelevancy, and incompetency, and on the special ground that it was not shown that any *testimonio* had ever been issued, nor was the existence of such *testimonio*, or the record thereof, or of the grant shown or accounted for.

This grant document, which is quite brief (R., 110–111), is translated by the Government as follows:

*To the Governor and Captain-General:*

I, Jose de Leyba, a citizen of the town of Santa Fe, appear before your excellency with that formality which may be legally proper and consistent with my rights, and state that in conformity with the royal ordinances of His Majesty I register a piece of lands and woods uncultivated and unsettled that will contain half a *fanega de maiz de sembradura*, a little more or less, which, on the east side, is bounded by the San Marcos road, and on the south by an arroyo which is called Cuesta del Oregano, and on the west by lands of Juan Garcia de las Rivas, and on the north by lands of Captain Sebastian de Vargas, and on account of all which I ask and pray with due humility that your excellency may be well pleased to make me grant, in the name of His Majesty, of said piece of land, for me and my children, heirs and successors, and that the royal possession be given me, that I shall thereby justly receive benefit and favor which I ask. And I formally swear that this my petition is not in bad faith, and whatever is necessary, etc.

(Signed) JOSEPH DE LEYBA. [RUBRIC.]

TOWN OF SANTA FE,
*May 24, of the year 1728.*

This petition was presented to the governor and captain-general of this kingdom by the party therein named, and having been examined by his excellency he treated it as presented, and in view of what this party asks for,

he would command, and did command, the chief alcalde of this town of Santa Fe to proceed to the place which the party mentions and to examine the land asked for, summoning those who live near, and in the name of His Majesty, who may God preserve, I make to him grant of what he asks for, it being without prejudice to any third party who may have a better right, provided that he settles it within the period fixed by royal ordinances. He shall put him in royal and personal possession of the said land, which possession he will enter in the proceedings at the end hereof. Thus his excellency decreed, commanded, and signed it before me, the present civil and military secretary. I certify.

(Signed) BUSTAMANTE. [RUBRIC.]

By command of the governor and captain-general:

(Signed) ANTONIO DE GRUCIAGA, [RUBRIC.]
*Civil and Military Secretary.*

At the town of Santa Fe, on the twenty-fifth day of the month of May, of the year one thousand seven hundred and twenty-eight, before me, Captain Diego Arias de Quiros, chief alcalde and war captain of said town, acting before me as special justice, with my undersigned attending witnesses, in compliance with the above order, issued by the governor and captain-general, Don Juan Domingo de Bustamante, I proceeded to give the possession which Joseph de Leyba asks for in his petition. I arrived at the spot and place for which the applicant asks, taking in my company Jose

Manuel Chirinos and Captain Sebastian de Vargas; and having examined the lands and woods which the said applicant asks for, I took him by the hand, in the presence of the said parties, performing the customary ceremonies, pulling up grass, throwing stones, and shouting as evidence that it was his. I gave him the royal possession in the name of his Majesty (God preserve him), in order that in his name and by his royal word the aforesaid party, his children, and heirs may enjoy it.

And in witness thereof I signed it as special justice with my undersigned attending witnesses, for lack of a public or royal notary, of which there is none in this kingdom; and it is on common paper on account of none of any kind being in use in these regions. I certify.

(Signed) DIEGO ARIAS DE QUIROS. [RUBRIC.]

Attest:

(Signed) JUAN MANUEL CHIRINOS. [RUBRIC.]

(Signed) JUAN JOSEPH LOBATO. [RUBRIC.]

Plaintiff also tendered in evidence archive 732 (R., 113–115), under admission of its genuineness, but under the objection that it was immaterial and irrelevant. An extract from page 8 in the book of the cabildo (a part of the archives of the surveyor-general of New Mexico) was likewise tendered (R., 115–116). The apparent purpose of the introduction of these two papers was to throw light upon the location of "the lands of Juan Garcia de las Rivas" mentioned as the west boundary call of the grant. Thus, archive 732 is a deed dated in 1701 from Joseph Castellanos to Miguel Garcia de las Rivas of a tract of land called

the Sitio de la Cienega held under grant from the Crown; and the extract introduced from the book of cabildo is dated November 26, 1713, and contains a recital that the father of Juan Garcia de las Rivas was Miguel Garcia de las Rivas. The only relevancy claimed for these instruments on the trial was that they established that as Miguel Garcia de las Rivas owned the tract of La Cienega in 1701, and as Juan Garcia de las Rivas was named as his son in 1713, therefore, the lands of Juan Garcia de las Rivas mentioned in the grant of 1728 was the above-mentioned tract of La Cienega.

The three documents just described constituted all the evidence introduced in chief by claimant on the subject of his grant, or the boundaries thereof, the remainder of his evidence in chief being directed solely to his deraignment of title.

Since this cause was appealed and docketed in this court, and since the record was printed, some important documents have been discovered and stipulated as part of the record in this court which throw much light upon the claim and simplify the facts of the case very much.

The documents which have been stipulated into the record are as follows:

The last will and testament of Simeon de Leyba, the son of the original grantee, Jose de Leyba. A copy and translation is found at pages 249 and 250 of the printed record, and was presented on behalf of the claimant Sena.

The following, presented by the United States, and contained in the "Addition Record," as follows:

First. A certified copy of the last will and testament of Salvador Leyba, dated March 12, 1836, taken from book "F" of the record of deeds in the office of the probate clerk and ex officio recorder for Santa Fe County, N. Mex., which appears to have been filed in said office for record on September 8, 1872.

Second. A certified copy of a deed by Juan Angel Leyba, for himself and on behalf of his sisters, Juana and Josefa Leyba, and Rafael Gutierrez, heirs of the deceased Salvador Leyba, dated March 24, 1836, to Jose Antonio Romero, conveying a piece of agricultural land 86 varas wide and 254 varas long; consideration, $43. Said sale is recited to have been made to pay the funeral and burial expenses of their deceased father.

Filed for record October 1, 1890, and recorded October 2, 1890, in book "V," pages 280 and 281, record of deeds of Santa Fe County, N. Mex.

Third. A certified copy of the last will and testament of Maria Josefa Leyba, dated June 19, 1860, taken from the files of the office of the probate clerk and ex officio recorder of Santa Fe County, and bearing indorsement, "Will of Josefa Leyba, ——, 197," and the approval and appointment of Serafin Ramirez as administrator, dated March 11, 1861.

Fourth. A certified copy of an *hijuela* from Jose Serafin Ramirez, administrator of the estate of Maria Josefa Leyba, deceased, designating the property which his wife, Maria Antonia Leyba, had inherited from her mother, Maria Josefa Leyba, deceased.

Indorsed on the said *hijuela* is a deed dated October 1, 1864, from Serafin Ramirez and Maria Antonia Leyba, his wife, to Jose Aguilar and Maria Apolonia Leyba to a portion of the property mentioned in said *hijuela.*

Indorsed also is a conveyance dated October 2, 1864, and acknowledged before Maximo Martinez, justice of the peace, on December 23, 1868, and filed for record on the 28th day of December, 1868, and recorded in book "E," at pages 40 and 41 of the record of deeds of Santa Fe County, N. Mex.

Recently appellant has discovered a deed from Salvador Antonio Leyba to his son, Juan Angel Leyba, dated August 9, 1834, to the rancho of the Coyote Spring with its houses and corrals, together with the grant in which the said ranch is situated, which was given to my grandfather by the King of Spain, the twenty-fifth day of May, one thousand seven hundred and twenty-eight.

And its boundaries are as follows, to wit: On the north by the lands of Capt. Sebastian de Vargas; on the east by the road which goes from the said city of Santa Fe to the spring of San Marcos; and on the west by the lands of the old pueblo of the Cienega; and on the south the hill (Cuesta) called the arroyo of the Oregano.

Which said conveyance will be found under "Further stipulation and addition to record" filed January 22, 1901.

These instruments are specifically referred to at this

time in order to avoid examining a large amount of oral testimony upon the pedigree of the grantors of Sena, which is now admitted.

The circumstances out of which grew Sena's activity and final acquisition of a supposed interest in this claim, so late as 1895, are to be found in the discovery and opening of very valuable turquoise mines in south Santa Fe County, and the accidental discovery of the grant papers while searching the Spanish and Mexican archives in the office of the surveyor-general for the Territory of New Mexico, in quest of evidence relative to what is known as the Sebastian de Vargas land grant, which was pending before the Court of Private Land Claims in the name of Louisa J. Purdy and others, they being represented by Mr. James H. Purdy, Mr. James W. Vroom, attorneys, and assisted by Mr. R. B. Wilson.

It appears from the testimony of Willison (R., 91 and 92) that he claims to have discovered this original grant to Jose Leyba, dated in 1728, while examining the archives in the De Vargas case, and that he made two or three trips down there and located the boundaries and made several plats, a copy of which was filed with the papers in this case. The alleged discovery was made about five or six years prior to the date of Willison's testimony before the Court of Private Land Claims, which latter date was May 3, 1900, which would make the discovery not earlier than 1894.

The subsequent conduct of the alleged discoverers is related in the testimony of J. P. McNulty (R.,

40–43) and the testimony of appellant, Sena (R., 19–21). After Sena obtained his deeds in 1895, he instituted suit in the district court for possession of the grant against J. P. McNulty, which he was finally compelled to dismiss, and then instituted suit in the Court of Private Land Claims, on September 29, 1899, for a confirmation of the grant as complete and perfect title.

The appellant, Sena, testified quite at length upon the pedigree of the persons from whom he purchased, as detailed to him by them and others, which it is deemed unimportant, since the family pedigree is quite well established by the documentary evidence stipulated into the record, showing that appellant's grantors were lineal descendants from the original grantee, José de Leyba.

On pages 19 to 21 of the record, Witness Sena shows how he happened to purchase an interest in this claim; that he went down to the property with two attorneys; that they knew of the turquoise properties at the time as being within the claim, and after that visit he purchased the interest; that, although he had spent all his life in Santa Fe, he had never heard of the existence of the grant until within a year or so before he bought, when he got the information from Mr. Purdy, the attorney who had come across the grant in looking up the south boundary of what is known as the Sebastian de Vargas grant.

The Government undertook to show by abundant and reliable testimony that no such grant as that

claimed was known personally or by tradition in the vicinity where claimed, and to that end the testimony of a number of the oldest men in the community was presented.

The testimony of six of these—*Nasario Gonzales*, age 83, living at La Cienega; *Jesus Narvais*, born in 1819, living at La Cienega; *Francisco Romero*, age 83, living at La Cieneguilla; *Francisco Bustamante*, age 83, living at La Cienega; *Jose Benevides*, born in 1827, living at La Cienega; *Susano Leyba*, age 66, living at the town of Cerrillos, and *Antonio Bustamante*, age 73, living about a mile from La Cienega—was taken before Mr. Justice Stone on February 23, 1900, upon proper notice to claimant. This testimony appears in the record at pages 135–162, and without repeating in detail what was testified to individually by these aged witnesses, all residents of the immediate vicinity, in some instances from their very birth, it is believed that the record justifies the assertion that they all testified to thorough familiarity with the premises claimed, to having used it or seen it used for fifty years or more; to the fact that no such grant as the Jose de Leyba grant has ever been heard of or claimed in that vicinity; that from the earliest times no one has occupied this land claiming it as a grant, but that, on the contrary, it has been considered and used by the community from time out of mind and without objection from anyone as public pasture land; that there are on the land the ruins of some shepherds'

huts constructed within twenty years by Jesus Narvais, one of the witnesses above named, but that before these were built there were no ruins of any kind. The witnesses further testified that the only occupancy that has characterized this tract, outside of the common occupancy for pasturage above referred to, has been within recent years by the American Turquoise Company and by certain holders of Government entries, all of them being codefendants with the Government, and holding adversely to the grant. They also testified that there was not known in that section of country, or at the place claimed by plaintiff for the south boundary of his grant, an arroyo known as the Arroyo del Oregano, or the arroyo called Cuesta del Oregano; and that there was nowhere in that vicinity, either at the place claimed by plaintiff as his west boundary or elsewhere, any property known as the lands of Juan Garcia de las Rivas; and witness Nasario Gonzales especially deposed to the fact that the lands of La Cienega, where he and the other witnesses live, has never been known as the lands of Juan Garcia de las Rivas, nor is that name mentioned in any of the old papers as applying to the La Cienega tract, where they live. The witnesses likewise testified to the fact that there were no lands of Sebastian de Vargas (claimed by plaintiff as his north boundary) in that vicinity, the only lands known by that name lying east of the Camino de en Medio, which is 12 or 14 miles from La Cienega. (R., 140.) It may be here remarked that the decision of the Court of Private Land Claims upon the Sebastian

de Vargas grant, as shown by the opinion of Mr. Justice Sluss and the decree, both in evidence, expressly limited that claim to the lands lying east of the Camino de en Medio. The result is that the location of the De Vargas lands, as judicially determined by the Court of Private Land Claims, does not at any point come within miles of the tract here claimed. The witnesses further testified to the fact that the country claimed is a bare level plain, devoid of timber and woods and absolutely without water for irrigation, thus showing that it could not have been the premises in contemplation in a petition asking for a piece of land and woods vacant and unsettled, enough for a half a *fanega* of corn-planting land. (R., 112.) It was also shown by these witnesses that there were in olden times no evidence of cultivation in and around Coyote Spring or elsewhere on this tract. There was also considerable testimony from these witnesses as to topography, and especially as to the fact that the old road from Cienega to Galisteo ran east of the turquoise mines. These facts, which bear only upon the boundaries of the grant if confirmed, are not properly for discussion upon the record as here presented.

In addition to these aged witnesses whose testimony was presented before Mr. Justice Stone, the Government produced at the trial several other witnesses of very considerable age who testified to the same state of facts.

One of these, *Susano Leyba* (R., 25–36), gave his age as 66, and stated that he had been raised at Bonanza,

which is within a mile or so of the property in question, and that he had always been acquainted with that section of country, having pastured over it from the time that he was less than 12 years old; that at no time had he ever heard of the Jose de Leyba grant, or any other grant covering that land, and that no one ever had interfered with pasturing there, it being regarded as common pasture land; that when he first knew the land there was no one living on it, or planting it, and there were no ruins of houses, evidence of former cultivation, or anything of that character, on the land. Witness also described the land as being devoid of timber and without water adequate for planting, the Coyote Spring yielding barely enough for drinking purposes. He also testified to the fact that there was no arroyo at the place located by claimant, or elsewhere in that vicinity, bearing the name of Oregano or Cuesta del Oregano, and likewise that he had never heard the lands of La Cienega called the lands of Juan Garcia de las Rivas. The cross-examination of this witness, which was quite lengthy, was confirmatory of his knowledge of the lands and natural objects in that section, although showing that in a number of instances, as, for instance, the Sitio de Juana Lopez and the Sitio de los Cerrillos, he knew the tracts by those names and not as grants.

*Alejandro Montoya* (R., 63–67), likewise sworn for the Government, testified to being 77 years of age, and to living in Cerrillos for about sixteen years, but to having been born in La Cienega, and thus being well

acquainted with the land in controversy; to the fact that he had never known of an arroyo down there bearing the name of Oregano or Cuesta del Oregano, nor had he ever heard of a claim of a grant in that vicinity under the name of the Jose de Leyba grant. He described the land around the turquoise hill as being a plain, and as having been used indiscriminately for pasture by himself and others in the past, and as having been so used without permission from or objection from anyone, and that the first he had heard of a claim of grant out there was the year before. Witness also testified to the fact that he had never heard out there of the lands of Juan Garcia de las Rivas, or of the pueblito de los Leybas, or the pueblo Viejo de la Cienega; and that when he first knew the Coyote Spring, as a young man of about 18, there were no ruins there. Being asked as to the plant called *Oregano*, witness testified as to his having seen it growing in a number of places, especially up toward the east, toward the mountains, it growing pretty near anywhere when it rains.

*Gabriel Sena*, sworn for the Government (R., 67–70), testified to being 57 years of age, to having lived at La Cienega ever since he was born, and to being well acquainted with the section in controversy. He testified that he had never heard of the claim of Jose de Leyba, or the Arroyo Oregano, or the Arroyo of the Cuesta del Oregano, or the lands of Juan Garcia de las Rivas down there; that in the early days this land

was not cultivated by anyone, but was used for pasturage by "everybody from Cienega," the pasturage being free and without objection from anyone; that garden cultivation had been accomplished there, not by irrigation, but by depending on the seasons and by the use of wells.

*J. P. McNulty* testified on behalf of the defense (R., 40–43) to his being the superintendent for the American Turquoise Company in the management of their mines, situated upon the land here claimed, and held by location and patent under the mining laws of the United States. Witness testified that although he had been in charge of these properties since March, 1892, the first he learned of this grant claim was in 1895 or 1896 (R., 41), after the confirmation of the Los Cerrillos tract by the land court. Witness described the visit of plaintiff and his attorneys to the mines in question in 1895 or 1896, about the time of plaintiff's purchase from the Leybas, at which time witness informed them that he was getting $200,000 out of the mines. Witness testified to the topographical conditions surrounding the mines, the fact that there was practically no vegetation, and indeed that water had to be hauled by him over 2 miles for domestic purposes; and also to the fact that his company had had possession there since 1891, and their possession had never been interfered with or attacked.

*Clayton G. Coleman* (R., 43–54), sworn on behalf of the Government, testified that he was a special agent of the Court of Private Land Claims, and that in the

performance of his official duties he had examined the papers in the cause, and had also visited the premises claimed a short time before the trial. On this visit he called on the oldest people living anywhere in that country (among them the aged witnesses presented by the Government) for information as to the boundary calls of the grant, and he also visited the natural objects set forth by plaintiff as his boundaries, so far as he could ascertain them; that the only boundaries he could identify were the San Marcos road, laid down on the sketch map filed by claimant as his east boundary, and the road from Los Cerrillos to Pecos, alleged to be the north boundary; that he was unable after inquiry from all the old people in the vicinity to find the lands of Juan Garcia de las Rivas, or the lands of Capt. Sebastian de Vargas. Witness described the San Marcos road as running not only on the east of the tract claimed, but also as extending for miles north and south thereof, having its origin in the city of Santa Fe, in leaving which it runs on the west front of the Territorial capital. Witness testified that he made every effort to locate the Cuesta del Oregano, and the Arroya of the Cuesta del Oregano, mentioned in the grant as its south boundary; but his inquiry among all the old people showed that there was no such arroyo known in that section of country, and indeed the only arroyos there located bear other and well-known names. Witness described the Coyote Spring as being about 2 miles north from the San Marcos Spring with a sort of divide about 50 feet in

height between the two springs; that the Coyote Spring yields only enough water for drinking purposes, and that the spring is outside of the grant claimed by Sena as the same is delineated in his sketch map by legal land subdivisions, and that there were no other water sources on the grant. (R., 51.) Witness identified the map tendered with his evidence as defendant's Exhibit A[1] (R., 163) as correctly showing the natural objects so far as they could be identified, and also the location of such objects as that location is claimed by plaintiff. Witness testified to the fact that the public surveys had been extended over this tract since 1861, the plat having been filed in the land office on March 24, 1885 (R., 48), and that within the tract were a number of homesteads and other entries, some of which had been patented, and upon which many improvements had been made. The testimony of the witness gives the list of these locations, and they also appear on his plat introduced in evidence. This plat also shows that the Cerrillos grant, confirmed and officially surveyed under the direction of the Court of Private Land Claims, as a perfect grant made in 1788 (as appears more in detail from the decree and official plat in evidence, R., 182–183), lies to a large extent within the claimed limits of this Leyba grant.

The testimony of Mr. Will M. Tipton (R., 54–63) was taken with reference to the topography of the country and the location of various other land grants with the view of showing that this grant, as described

by boundaries, was most likely located just south of the Territorial capitol in the city of Santa Fe. The discovery of the will of Simeon de Leyba and the deed of Salvador Leyba to Juan Angel Leyba, in which the Coyote Spring seems to furnish a *locus* for the claim, although, strangely enough, the expediente makes no mention of the Coyote or other spring, renders unimportant many of the archive documents used in connection with Mr. Tipton's testimony which need not be considered, viz:

Archive documents, to wit: Nos. 24, 527, 1043, 960, 962, being, respectively, Exhibits C 1 (R., 164), D 1 (R., 166), E 1 (R., 168), F 1 (R., 170), G 1 (R., 171), H 1 (R., 173), I 1 (R., 174), all of which are included in the record from page 154 to 175, both inclusive.

Archives No. 313 and 640 (R., 176–177) show that Capt. Juan Garcia de las Rivas and Capt. Sebastian de Vargas both owned lands prior to 1728, lying very near Santa Fe and just south of the Santa Fe River, which were located by Mr. Tipton as being adjacent.

The decree of the court confirming the Sebastian de Vargas grant and the plat of the survey made pursuant thereto were also introduced (R., 178–179), showing that that grant as judicially located is not within many miles of the lands here claimed, and that it can not, therefore, be the north boundary of these lands as pretended by claimant.

The title papers of the San Marcos grant, claimed to be coterminous with this grant, were also presented (R., 180), showing that that grant made in 1754, and

thus years after this grant, and alleged to adjoin this grant, contains no reference whatever to its existence as a boundary or otherwise, the north boundary of the San Marcos grant being recited to be "some red rocks on an arroyo."

For similar purposes the petition, title papers, decree of confirmation, approved plat, and field notes of the Los Cerrillos grant were introduced (R., 182–193), showing that, although this grant lies largely within the claimed limits of the Leyba claim, the granting officer in 1788 made no reference whatever to the existence of the Leyba grant, and the officer who conferred juridical possession equally omitted any reference to the existence of such a claim in the vicinity; and this despite the fact that it was customary under the Spanish system for the officers executing a grant or giving possession to summon adjoining settlers, if there were any.

With the introduction of the affidavit of Mariano Sena, the plaintiff, executed on December 30, 1897 (R., 193–194), and the admission of record by claimant's counsel that this claim had never been presented to the surveyor-general of New Mexico for action under the act of 1854, or otherwise (although plaintiff disclaimed any obligation on the part of claimant to take such action), the Government closed its case.

In rebuttal, claimant presented as a witness *Antonio Jose Campos* (R., 71–85), who testified to being 69 years of age, and being a resident of San Miguel County, N. Mex., although a native of Santa Fe. Witness

testified to having known of the country in controversy since he was 15 years of age, or since 1845, by reason of having been in the employ of one Gaspar Ortiz y Silva, and that such acquaintance had continued until he moved to San Miguel County in 1865 or 1866; that he knows the Coyote Spring and the San Marcos Spring, the former being a water hole very near an arroyo called the Arroyo del Oregano, and that toward the east from this Coyote Spring are some ruins which he first saw when he was down there as Mr. Silva's manager in 1853 or 1854. Witness described these ruins as being at that time about a yard and a half high, and constituting three or four rooms of stone and mud. Witness testified, over objection, that he had heard of these as being the houses of the heirs of a certain Jose de Leyba, and about this being the Arroyo del Oregano, from certain old men whose names he gave (R., 73). Witness was asked (R., 73) if he had ever learned "from any of these old men why that house *had been abandoned* near that Coyote Spring," and replied that he was informed that they were driven away by the Indians, who killed at the Cuesta del Oregano there a man by the name of Juan Angel, who was a Leyba, the son of Salvador Leyba, or at least so he was told. He further testified that while he did not know anything about the boundaries, two old men had told him that it was a grant given by the Government to Jose de Leyba, and extending from the Coyote Spring to the Cienega (R., 73). Witness fixed the Cuesta del Oregano, as it had been pointed out to

him, as being a little toward the west from the Coyote Spring. The attention of the court is called to the fact that the sketch map presented by claimant, as well as all his other testimony, locates this *cuesta* east of the Coyote Spring.

On cross-examination witness testified that while he had come from a distant county to testify, he had never talked with the plaintiff or anyone else about the case before going on the stand, and, indeed, did not know the plaintiff at all (R., 74). He testified that before going to San Miguel county in 1865, and while acting as manager of Silva, he lived in the city of Santa Fe, and that his acquaintance with the land in question was derived from business trips and from the fact that Silva's cattle were pastured down there—pasturage all over that country being *without objection from anyone*. Witness was first at the Ojo del Coyote sometime prior to 1846, and the last time in 1861 (R., 76). As showing that at this early date there was no claim of ownership to this land, the following testimony of witness is pertinent (R., 78).

> Q. That plain to the north and east of Ojo del Coyote, how was that used at the time you were down there pasturing?
>
> A. The people of La Cienega used to use it by letting their animals loose on it, and were in control of my stock in the Arroyo de Vasquez.
>
> Q. Did you come on these plains to the north of the Ojo del Coyote?
>
> A. No; I said that we used to control our stock toward the south.

Q. And the people of La Cienega used to pasture over there, did they?

A. Yes; it was pastured all over by all these people.

Q. It was general—it was in general that all these people pastured their stock there? Nobody ever objected to their pasturing, did they?

A. *Nobody opposed it.*

Q. *It was all common for pasture?*

A. *It was free.*

Q. *And that was when you were first there?*

A. *Yes, sir; the first time.* I saw it always since I lived there.

Witness further testified (R., 78) that he was at the Ojo del Coyote only several times after 1846; that it was a very poor spring, and he "was not much in love with it" and did not know whether it was in an arroyo or not, as he did not "take enough interest in anything" (R., 78).

Further cross-examined, witness showed a very marked lack of knowledge of the surrounding country, placing the Arroyo del Oregano a mile and half or two from the Coyote Spring (R., 80), when all the other testimony is that it comes from and is toward the east; placing the Arroyo de la Piedra to the east beyond the spring of San Marcos, when all the maps put it in the immediate vicinity of the Coyote Spring and far north of the spring of San Marcos; testifying that he did not know where the Arroyo del Oregano joins the Arroyo de la Piedra, or whether it joins it at all, not having paid close attention; and this notwithstanding the fact that witness pretends to an accurate knowledge of the

locality, one that is urged should prevail over the testimony of eight or ten witnesses who have spent the last forty years, not in the county of San Miguel, but at the very land in question; confessing his utter inability to state the distance of the ruins from the Coyote Spring—whether a hundred yards or three thousand; disclaiming knowledge of how the arroyo containing the Coyote Spring runs, whether east or west, never "having paid much attention," and in fact having stopped at this spring apparently only one time, not being "very much in love with that arroyo or with that spring," although he had passed by there several times; admitting that he did not know whether the spring was in an arroyo or not, because he was not there himself very long, having just established the ranch for the herders and not having paid close attention. In the further progress of his cross-examination (there having been an intervening recess) witness recalled his statement that he had not talked with Sena, the claimant, and with commendable but rather tardy frankness admitted that he had talked with Sena, and even that Sena was paying the expenses of his trip.

*R. B. Willison*, sworn on behalf of claimant (R., 8697), testified to being a resident of Santa Fe thirty-three years and to his familiarity with the premises in question. He stated that he knew the pueblo Viejo de la Cienega and that the Arroyo de la Cuesta del Oregano had been shown to him as located a trifle over a mile north of the San Marcos Spring; that he knew the

Coyote Spring, which is located in an arroyo about 400 yards west of the road leading from San Marcos to Cerrillos and between a fourth and a half mile west from where it joins the Arroyo Gallinas; that the bearing of the arroyo in which the spring is located is nearly west, south of it going toward San Marcos Spring, there being considerable elevations; that the Cuesta del Oregano is northeast of the Coyote Spring (it will be recalled that the last witness, Campos, placed it southwest); that the Coyote Spring is situated in the Canyon de los Arroyos and the Arroyo del Oregano is about 300 yards northeast from the Coyote Spring (R, 87). (It will be recalled that Campos puts this arroyo a mile and a half from the Coyote Spring and southwest of the spring.) Witness testified (R., 87) to having known and visited the Coyote Spring in 1869, at which time he saw some extensive ruins, among others a chimney at least 9 feet high, and having the appearance of having been formerly inhabited, which witness stated, over objection, that Don Manuel Baca y Delgago, at that time about 78 or 80 years of age (R., 88), had informed him had been occupied by the descendants of the original grantee, as had been some other ruins between a fourth and half a mile to the east on the margin of what had been pointed out to him as the Arroyo del Oregano. Witness further testified (R., 89) that evidence of these ruins was still to be seen, but greatly diminished. Witness disclaimed any knowledge of the Arroyo del Oregano or Cuesta del Oregano until about seven years ago, when Don Manuel Baca y Delgado

had pointed them out to him. It appears from the record (R., 91) that this was about the time when the De Vargas grant, in whose prosecution witness took a prominent part, was being vigorously agitated with a view of extending out the land in question, but with the indifferent success shown by the decision of the Court of Private Land Claims. Witness being asked as to the western boundary of the lands of the De Vargas, testified fully as to that boundary as originally contended for by claimants and as rejected by the court in its decision. Referring to the north boundary of the San Marcos grant, witness puts this about 265 yards south of the Coyote Spring, and he identified the San Marcos road, as delineated on claimant's sketch map, as having been so known by him for thirty-three or thirty-four years. Witness testified to the fact that on his first visit to Coyote Spring there was no evidence of land having been cultivated in that vicinity, but that recently ranches had been taken up northward from this spring, but that there was no permanent water flow, for irrigation and cultivation must depend upon artesian flow or flood water. On cross-examination (R, 91) witness referred to the fact that he had discovered the archive upon which this claim is based in making investigation upon the De Vargas case, and that he had thereupon made two or three field examinations of the land as well as plats of it, the plat attached to plaintiff's petition being a copy of one made by him. On his attention being called to the fact that this last-named plat shows the Coyote

Spring located in the Arroya de la Piedra, when witness (R., 93) had just testified that it was in the Canyon de los Arroyos, witness (R., 93) swore that that copy was not correct either as compared with the original made by him or with the conditions on the ground. Being asked to locate the Arroyo del Oregano and its junction with the Canyon de los Arroyos, upon defendant's Exhibit A[1], witness did so, indicating the course of the arroyo by the word arroyo in red ink, the letter "A" in red ink locating the junction. He testified that this Arroyo del Oregano hardly extended back farther than a mile from the Coyote Spring.

*Agustin Ramirez*, likewise called by the plaintiff in rebuttal (R., 97–103), testified to being 53 years of age and to residing at Galisteo. He gave the name of his mother as being Antonia Leyba and his father Serafin Ramirez; that his mother's mother was named Josefa Leyba, her father Salvador Antonio Leyba, her grandfather Simon Leyba, and her great grandfather Jose Leyba. He testified that his mother had a sister, Apolonia Leyba, and a brother, Jesus Leyba, and that Salvador Leyba, who lived at Peña Blanca, was an uncle of his mother, a statement of relationship that is clearly a mistake, as under the genealogy as given they were evidently cousins. He testified that Salvador was a son of Juan Angel Leyba, who in turn was a son of Salvador Leyba, and that he had heard that Juan Angel had been killed by the Indians at the Cuesta del Oregano (R., 97–98), which is about 300 yards, more or less, to the north of San Marcos

Spring, according to witness's recollection, which he admits was very limited. Witness stated that he did not remember any grants in New Mexico which any of his family claimed to own, but later, in response to a question mentioning the Jose de Leyba grant by name, stated that he had heard from his mother "that that grant belonged to them, to their grandfather," situate about 14 or 15 miles from Santa Fe, and up to the north from where the Coyote Spring is. Witness had also heard of the Pueblito de los Leybas, but did not know where it was; and had also heard that Juan Angel Leyba was killed 2 or 3 miles from where he lived in going down the slope to the Placers. Witness did not know the time of Juan Angel's death, except that it occurred before the birth of witness, and thus some time prior to 1846. Witness testified in detail as to the heirs of his mother's brothers and sisters, and also to the fact that his mother's full name was Maria Antonia Leyba de Ramirez.

On cross-examination he testified to the fact that he was entirely lacking in knowledge of his ancestry so far as it lay outside of the Leyba family, and the only excuse he could give for his lack of knowledge was the fact that "it is a long time," and he "did not remember" (R., 100). He also swore that his mother always went by the name of Leyba de Ramirez, and was never called anything else; that she, as well as witness, had testified in the case of the *United States of America* v. *The San Pedro and Cañon del Agua Company* in the district court of Santa Fe County; that he was

present when she testified, and that was the name she gave as her name; that he saw her sign her name to her testimony, and that to witness's certain knowledge that was the name she used. As showing the utter fallacy of this testimony, the Government (R., 215–225) offered the testimony of Ramirez and his mother, given in the Cañon del Agua case, showing that she gave and signed her name all through that testimony as Maria Antonia Sandoval. Deeds tendered in the same case were offered, showing that in signing these instruments witness's mother never used the name Leyba de Ramirez, but always Maria Antonia Sandoval (R., 226, 228, 229, 235, 236, 238).

This shows the total unreliability of the statements of this witness and the care which should be exercised in determining the force to be given any statement he might make, which is not completely corroborated.

*Eligio Sedillo*, also called by claimants in rebuttal (R., 103–105), testified to being 67 years of age and to having lived at Santa Fe all his life; that he knew the Coyote Spring as early as perhaps 1854, at which time there was a ruin of perhaps four rooms to the east of the Coyote Spring, the walls in some places being about 2 feet and at other places a little higher.

Claimant further offered in rebuttal, for purposes which were not disclosed, the decrees of confirmation of the Los Cerrillos grant, No. 79, and the Sitio de Juana Lopez grant, No. 82, and also the grant papers of the San Marcos grant, already introduced by the Government. There was also presented (R., 123) deed

dated November 22, 1844, from Domingo Fernandez to Demetrio de la Ora, deed dated November 23, 1846, conveying certain property by Demetrio de la Ora to Eugene Leitendorf (R., 124), and deed by partition made by Domingo Fernandez, dated February 5, 1857 (R., 125), being a partition of the lands among the heirs of his mother, Maria Francisca de Sena, all these presumably for the purpose of showing that the De Vargas lands extended westward as far as the lands here claimed. It is assumed that these documents will be as lacking in efficacy to establish that position now as they were on the trial of the De Vargas claim itself. The opinion of the court in the De Vargas case, already tendered by the Government, was also tendered by claimant, as was archive 180. The relevancy of this last document does not appear unless it consists in the references to Juan Garcia de las Rivas and the lands of Capt. Sebastian de Vargas, but it is not believed that this latter document throws any such light upon the issues in the case as requires its further consideration in this statement.

A stipulation as to the status of the Muñiz entry, one of the turquoise claims, was entered in the record (p. 109), and after the taking of the testimony of Fernando Nolan, also in rebuttal (which testimony, however, proved to be entirely immaterial), both parties on May 4, 1900, announced closed and submitted the cause.

On May 10, 1900, the court, through Mr. Justice Stone, announced its unanimous conclusion rejecting

the claim on the ground that the same was not at the date of the treaty a perfect and complete title; and not having been presented within two years from the taking effect of the act of March 3, 1891, the claim was thereby abandoned and forever barred (R., 240).

A decree was accordingly, on May 10, 1900, entered, rejecting the claim and dismissing the petition (R., 240).

On March 5, 1900, claimant was allowed an appeal to this court.

I.

*The granting instruments conveyed title only to a piece of land that would contain a half a fanega de mais de sembradura, a little more or less.*

A consideration of the recitals contained in the expediente consisting of the petition, granting order, and act of possession (R., 112 and 113), leads directly to conclusion that the title intended to be conveyed was to a piece of land and wood uncultivated and unsettled, that would contain enough land to plant a half a *fanega* of corn, a little more or less. In the absence of other evidence than the expediente, the area included within the grant and within the boundaries given would be construed to include only enough land upon which to plant half a fanega of corn. A *fanega de mais* is a measure of corn which will plant 8.82 acres, and half a fanega would measure 4.41 acres.

The present claim of the location of the natural objects and lands of others named in the petition as bounding the grant will include about 18,000 acres.

The discrepancy between the quantity asked for and that included within the boundaries, as shown by the evidence, is so glaring as to arrest serious attention. Nothing on the face of the expediente discloses this extravagant difference, and not until the location of the boundaries by evidence outside of the expediente is attempted, is one aroused to the importance of the discrepancy between the title and the present claim.

It is evident by the petition for the grant that the primary thought in the mind of Jose de Leyba was *a piece* of land sufficient for planting a half a fanega of corn, or about 4.41 acres. The total area contained within the boundaries, amounting to about 18,000 acres, was not expected by the petitioner to be given him with full title. The expressed purpose was the cultivation of *a piece* of land by planting corn, not the acquisition of a large tract of land for the general purposes of ranching.

The granting order and act of possession seem to treat it as a piece of land of no great extent. Quantity was of the essence of the entire grant, else the alcalde would have named the outboundaries in the act of possession. His language is that "I arrived at the spot and place (puesto y paráje) for which the applicant asks, taking in my company Jose Manuel Chirmos and Capt. Sebastian de Vargas, and having examined the lands and woods which the said applicant asks for, I took him by the hand, in the presence of the said parties, performing the customary ceremonies, pulling up grass, throwing stones, and shouting, as

evidence that it was his. I gave him the royal possession in the name of His Majesty (God preserve him), in order that in his name and by his royal word the aforesaid party, his children, and heirs may enjoy it."

If 18,000 acres, instead of a small cornfield of 4 or 5 acres, were intended to be included within the so-called juridical act, all doubts could have been removed by defining the boundaries of the tract then and there, that the grantee and others might respect and observe them.

The attempt of grantees of land to hold large "excesses where the indicated boundaries are supposed to cover only a certain quantity of land which, when resurveyed, turns out to be much larger than as described in the titles," received the attention of the Spanish Crown as far back as the sixteenth century, and in no single instance, either under Spain or under Mexico, has the attempt to hold great excesses of land over the lawful title, by reason of the boundaries upon reinvestigation being found to contain such excess or overplus, been recognized as lawful; but right of disposition of such overplus was asserted both by Spain and Mexico, although privilege or preference was often given the holder to acquire the overplus; but the *jus disponendi* of the excess was retained and exercised by Spain and Mexico, and when unexercised by either passed to the United States.

Such right was asserted and enforced, whether treated upon principles applicable to voluntary grant or purchase and sale.

This question has recently received much consideration by this court in a number of cases appealed from the Court of Private Land Claims affecting grants in the Territory of Arizona.

In the case of *Ainsa* v. *United States* (161 U. S., 208) it was contended by counsel for appellant that where quantity and metes and bounds were both used, any variance should be resolved in favor of that description which was the most certain. While admitting the general rule, Mr. Chief Justice Fuller, delivering the opinion, said:

> So monuments control courses and distances, and causes and distances control quantity; but where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much and no more is plain. (229.)

The intention to convey about enough land to plant a half a *fanega* of corn, or 4.41 acres, can not be expanded to cover 18,000 acres by the use of the qualifying phrase "a little more or less," and especially when the act of juridical possession does not mention the boundaries of the land of which possession is given.

From the petition and statement of the use for which it was desired, and the act of possession omitting any mention of the boundaries of so large a tract, impresses one with the belief that a small quantity of land was the limit of the grant and the hard and fast application of the common-law rule should find no abiding place in the construction of such conveyances, especially

when considered under the Spanish and Mexican policy of claiming and exercising the right of disposition of the overplus within the outboundaries of such grants.

Any overplus lands within the metes and bounds described is variously known in Spanish and Mexican law as *demasias*, *excedencias*, *excesos*, and *sobrantes*.

The rule applicable to such overplus declared by this court in the *Anisa case* (*supra*) has been affirmed and reaffirmed.

> *Ely's administrator* v. *United States*, 171 U. S., 220; *United States* v. *Maish*, 171 U. S., 277; *Perrin* v. *United States*, 171 U. S., 292; *Reloj Cattle Co.* v. *United States*, 184 U. S., 624; *Anisa* v. *United States*, 184 U. S., 639; *Arivaca Land and Cattle Co.* v. *United States*, 184 U. S., 649.

Whatever influence open, notorious, and exclusive possession might have upon the construction to be placed upon the extent of the title can avail nothing here, for, said Mr. Justice Stone, in delivering the opinion of the court below (R., 240):

> The evidence as to the settlement and occupation of the tract purporting to have been granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of grant, and knowledge of the existence in the community or by the oldest inhabitants now living, is so vague, contradictory, and uncertain as to be almost wholly wanting.

The vast areas of pasture lands, the woods, and water were usually designated to be for the common use of the people in the vicinity, and such was the

general policy of the Spanish law. No reference or mention is made of the Coyote Spring, the only water anywhere in the vicinity. It is passing strange if this grant covered 18,000 acres, and just on the edge of it was the only available water in all that country, it was not made by the title documents themselves the *locus* of the grant and referred to in some manner, for now it seems to be the main feature in this claim aside from the turquoise mines. It is insisted that quantity was of the essence of the grant and was the controlling feature and indicated the intent of the granting officers and the petitioner. Where doubt arises respecting a royal grant, even a Congressional grant, it is resolved in favor of the Government. (*Slidell* v. *Grandjean*, 11 U. S., 412–437; *United States* v. *Oregon, etc., Ry.*, 164 U. S., 526.) The boundaries given can be treated as the general location within which Jose de Leyba had selected his *piece* of land that would be sufficient to plant a half a *fanega de mais*, or 4.41 acres.

But as tending to show that the entire area included within the boundaries delineated by appellant's sketch map was not claimed at an early date, and as throwing some light upon the extent of the claim and occupation shortly after 1783, attention is called to the plat opposite page 162 of the record, which shows that the Cerrillos grant, confirmed and officially surveyed under the decree of the Court of Private Land Claims as a perfect grant, made in 1788 (R., 182–193), lies to a considerable extent within the claimed limits of this Leyba grant.

It is hardly probable that Leyba was occupying and asserting title under the will of his father, or otherwise the Cerrillos grant of 1788, five years after the death of Simeon Leyba, would not have overlapped it. In this instance it is a clear regrant to someone else of a portion of the land claimed by Sena as being the land of the Leybas. The Leybas as early as 1788 were not exercising possession of the land to the outboundaries, or the Cerrillos grant would not likely have been made. See the case of *Bergere* v. *United States* (168 U. S., 66, 84, 85).

But, as bearing upon the exercise by the Crown of the *jus disponendi* of the overplus within the metes and bounds, the absence of serious, open, exclusive, actual possession anciently begun and consistently continued can not be overlooked as effecting the original intent and assertion of ownership to the exclusion of others in determining the estate granted and extent thereof.

In the case of *Bergere* v. *United States* (168 U. S., 66, 84, 85), it is said:

> The action of the Mexican Government in making grants to third parties of certain portions of these lands, as vacant and unoccupied lands, is also of some importance. The grants were made at times which were long subsequent to the petition of Baca and the making of the return by the alcalde, and were made after an official examination of the lands then granted and a certificate that they were vacant.
>
> We express no opinion as to the validity of these grants, and we allude to the subject only for the purpose of pointing out how the facts

> appear to the Mexican officials, who at that time were engaged in an investigation of the question of occupancy, and who reported the lands mentioned in the respective grants as vacant and unoccupied, which we may assume they would scarcely have done had Baca or his heirs then been in the actual possession and occupation of those very lands.

From all the evidence and upon the newly discovered will and deed the Coyote Spring seems to furnish the *locus* of "the *spot and place* (puesto y paráje) for which the applicant asks;" and around which now seems to cling the only certainty of the location of the general tract except the San Morcas road, for the lands of Juan Garcia de Las Rivas and Capt. Sebastian de Vargas and the arroyo called Cuesta del Oregono are so uncertain of location as to be useless in determining the outboundaries of the small cornfield or the 18,000 acre tract.

If the Coyote Spring was the "spot and place" at which the piece of land, enough to plant a half a *fanega* of corn, was located and so as to include it, then quantity is the most certain element of description contained either in the expediente or the other documents and oral testimony in the record.

II.

*This grant was not perfect and complete at the date of the treaty, and is barred by the act of March 3, 1891, as well as upon principles of equity.*

The first of these positions is the ground upon which the court below rejected the claim.

This grant, made in 1728, is subject to the royal cedula of October 15, 1754 (Reynolds, p. 50). That cedula in its preamble is recited to be for the protection of the Crown against those who "maintain themselves on land usurped without title," and was, pursuant to a well-established policy of the Spanish Crown, consistently adhered to up to the date of the independence of Mexico, and after that date continued by the Mexican nation. Legislation illustrative of this continued policy is found under the Spanish régime in the ordinance of intendants of December 4, 1786 (Reynolds, pp. 59, 61), and the cedulas of March 23, 1798 (Reynolds, p. 65), and of February 14, 1805 (Reynolds, p. 68), and under the Mexican system in the colonization law of August 18, 1824 (Reynolds, p. 121), and the regulations supplemental thereto, dated November 21, 1828 (Reynolds, p. 141). This system was one, in short, by which to take title out of the Crown the concurrence of two separate sets of officers was necessary, the act of the first set of officers granting and conferring possession of the land being subject to confirmation by another officer designated by law. Under the cedula of 1754 the conferring power was (section 5) vested in "the audiencias in their district and to the other officers to whom the power is given by these new instructions," which in the case of "provinces remote," such as New Mexico, was the governor, "with the approval of the royal officers and the acting attorney-general where there is one" (section 12).

Under the ordinance of intendants of 1786 "the necessary confirmations" were to be made by the superior board of the treasury (section 81); and under the Mexican system the territorial deputation or departmental assembly (Reynolds, pp. 141–143) were required to approve before the grant became "definitely valid" (section 5). The evil to be checked by all these requirements is indicated in section 5 of the cedula of 1754, where it is made the duty of the confirming authority to examine as to whether the sale or composition is made "without fraud or collusion" and "at proportionate and equitable prices." The evil attending unrevised alienations is illustrated in the line of Arizona grant cases recently before this court where the boundaries named included many times the quantity paid for; and, in the present case, where an area of 18,000 acres is claimed on a petition for a cornfield.

Instances of cases discussing the necessity for a confirmation are afforded by *Menard* v. *Massey* (8 How., 293) and *Paschal* v. *Perez* (7 Tex., 348).

Applying the law to the facts of the present case, it seems sufficient to simply call attention to the fact that there was no confirmation of the title issued or of the possession given, and that at the date of the treaty this was still the condition of the title, rendering it at that date incomplete and imperfect, and thus subject to the limitation of two years imposed by section 12 of the land-court act.

The suggestion made in the court below that a confirmation should be presumed from the lapse of time

between the date of the grant and the date of the treaty and the possession proved is not tenable either as a matter of law or fact. Under the Spanish and Mexican régime the doctrine of presumptions did not extend to that extent. The law of presumptions can not supply the lack of an act which the express requirements of the granting power provides must exist, and it has been consistently held by Mexican jurists that a confirmation under this cedula will not be presumed even from long-continued possession.

The testimony of the witnesses for the Government—men upward of 80 years of age—show that possession had not been held within their knowledge, either personal or as a matter of tradition. This court has held in the case of the *United States* v. *Pendell* (185 U. S., 189, 197) that it will defer to the judgment of the court below on matters of fact such as possession; and in that case the views of a majority of the court, declaring the possession proved to be most satisfactory, were followed and adopted. In this case the court below, speaking through Mr. Justice Stone, says (R., 240):

> The evidence as to the settlement and occupation of the tract purporting to have been granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of grant, and knowledge of the existence in the community or by the oldest inhabitants now living, is so vague, contradictory, and uncertain as to be almost wholly wanting.

And the court follows with this observation:

> There is no evidence in this case, either by the documents presented or otherwise, that these requirements of the ordinance of 1754 were ever complied with. Nor is there in the nature of the case or upon any of the facts presented in evidence any grounds that will justify a presumption of such compliance with the requirements for confirmation.

The express determination by the court below on the value and weight of the testimony presented to establish possession will be found to accord entirely with the proofs as submitted, and under such proofs there is no justification for indulgence in presumptions flowing from a serious, open, exclusive, actual possession, anciently begun and consistently continued.

Should the title be construed to cover the land according to the metes and bounds, regardless of the quantity mentioned, then, in order to invoke the presumption of approval of the grant by reason of the lapse of time, the facts must clearly appear upon which to predicate such presumption, viz, that the possession has been so open, notorious, and exclusive that it would be inequitable to decline the indulgence.

The rule of presumption is indulged to supply an admittedly omitted act, because from the facts proven in a given case it would be inequitable and unconscionable to hold otherwise.

When the Court of Private Land Claims is called upon to deal with uncompleted paper titles and indulge in presumption of approval by the former

government upon equitable consideration, is it not by the decree of confirmation completing in judicial form that which was entitled to but had not received that final approval, without which complete vesture did not take place? If so, such case must fall under section 6 of the private land claims act.

If the overplus lands within the metes and bounds can be claimed now, it must be by virtue alone of the equity arising upon the character of possession, which the court might have considered had the suit been instituted within two years from March 1, 1891, but to hold the title complete and perfect to such lands is to say that by the grant of 1728 complete and perfect title passed to the entire 18,000 acres, and nothing remained to be done, and the laws of Spain and Mexico relative to excessive holdings have no application to the present case.

III.

*This claim is a stale one and not entitled to recognition, according to justice and right, from a court proceeding upon equitable principles.*

The Court of Private Land Claims is one proceeding "as near as may be according to the practice of the courts of equity of the United States." When tested by the rules of equity, what is the standing of the claim now urged? The facts of the case are simply these: A piece of land was granted to one Jose de Leyba in 1728. According to claimant's evidence, and thus from the standpoint most favorable to him, the tract was abandoned, because of Indian hostilities, at

some date prior to 1846. According to the Government's witnesses nothing had been heard of the claim within the memory or tradition of men born as far back as 1817. In this vacant, abandoned condition, used as common pasture and considered as public land, this tract passed under the dominion of the United States by the treaty of 1848. In 1854, six years after the treaty, the surveyor-general was given authority to consider and pass upon claims such as this, and report his conclusions and recommendations to Congress. Still the descendants of Leyba, if any there were, declined to resume possession of what is alleged they held by perfect title; declined, also, to indicate by petition or otherwise, under the act of 1854, that they made any such claim. The public-land surveys were extended over the tract in 1861, homestead and other entries were made, improvements established, patents secured, mining locations made, large and valuable mines developed, and during all this time the Leybas, with an alleged perfect title, made no attempt to assert their rights, and offered no objection. In 1891 the Court of Private Land Claims was established, and all persons having imperfect titles were required to present them within two years; claimant and his grantors still remained quiescent and allowed adverse rights to be acquired and extensive improvements to be made. In 1894, in the prosecution of another suit for confirmation of the Sebastian de Vargas grant, the archive containing the titles here asserted was found and brought to public

notice for the first time in perhaps a century. Appellant, inspired by the mineral value of the property, and operating under methods which were illustrated in the testimony of Francisco Romero (R., 162) and in the peculiar nature of the testimony of the witnesses presented on his behalf, entered upon the search for an heir, and finally in 1895 found two lineal descendants, from whom he secured deeds—deeds to a grant which he, a resident of long standing, had never heard of until the excavation of archive 441. Even then plaintiff declined to seek the establishment of his speculative claim, as it was not submitted to the Court of Private Land Claims for its adjudication until the fall of 1899, when he attempted to secure a confirmation as against the Government and to divest the mineral claimants, who have not yet secured patent, of all they have discovered and developed during their ten years' occupancy. And this upon the archive thus accidentally discovered and without pretense of producing from the hands of claimants the testimonio of which they shall have held possession, or account for its nonproduction. It is not believed that this is the character of claim which a court of equity will tolerate. The laches of the claimant in its presentation, while witnesses who knew of its right to recognition were dying, and third parties who knew nothing about it were establishing valuable adverse rights, place it in the catalogue of stale claims against which the doors of a court of equity are closed, independent of statutes of limitation.

This belongs to the class of cases instanced in *United States* v. *Martinez* (184 U. S., 441), where the claimant's remedy is held upon equitable principles to be barred by delay.

To the same effect see—

*Gildersleeve* v. *New Mexico Mining Co.* (161 U. S., 573).

*United States* v. *Moore* (12 How., 209, 222).

*Indiana* v. *Kentucky* (136 U. S., 479).

*United States* v. *Repentigny* (5 Wall., 211–218).

*Muse* v. *Arlington Hotel Co.* (68 Fed. Rep., 637, and cases cited).

*Tierbont* v. *Millican* (61 Tex., 514).

Looking at this record in the most favorable light for appellant, the Leybas, long prior to the treaty of Guadalupe Hidalgo, appear in no way to have asserted any interest in the grant, but stood by and saw the country pass from Mexico to the United States and neither resumed nor attempted to resume possession of the land. The Congress of the United States, to carry into effect the obligations assumed under the eighth article of the treaty, by which it was agreed to respect rights of property in the ceded territory in existence at the date of the cession, passed an act entitled "An act to establish the office of surveyor-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes," approved July 22, 1854 (10 Stats., 308, chap. 103). By the eighth section of this act it was made the duty of the surveyor-general, under rules and regulations to be established by the Secretary of the Interior, to inquire

into and report to Congress upon the validity or invalidity of all claims to lands within the territory ceded by Mexico which had originated before such cession, which report was to be laid before Congress for such action thereon as might be deemed just and proper, with a view to the confirmation of *bona fide* grants.

It was further provided in said section (8) that "until the final action of Congress on such claims all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act." This act remained in force until the passage of the private land claim act of March 3, 1891, and was administered liberally and economically in the interest of those claiming lands protected by the treaty.

It is within the judicial knowledge of this court that nearly all of the grants so protected, and to which *bona fide* rights were claimed, were presented to the surveyor-general for investigation and report; many received favorable action by Congress and have long since passed to patent; others were left unacted upon by Congress and have been asserted in the court of private land claims. In nearly all claims filed under the law of 1854 testimony was filed in support thereof, and the benefit of such evidence as was presented may be received by the court of private land claims under the provisions of section 5 of that act (26 Stat. L., 854).

SEC. 5. That the testimony which has been heretofore lawfully and regularly received by

> the surveyor-general of the proper Territory or State, or by the Commissioner of the General Land Office, upon any claims presented to them, respectively, shall be admitted in evidence in all trials under this act when the person testifying is dead, so far as the subject-matter thereof is competent evidence; and the court shall give it such weight as in its judgment, under all the circumstances, it ought to have.

The Leybas, if they claimed and desired to assert their grant, were furnished every inducement and opportunity to present and have preserved the evidence of their rights, thus preventing the United States from treating the land as public domain and inviting citizens to settle and explore the same, invest their means and render the same valuable, upon the good faith of the invitation given by the United States and the total absence of any facts which would put either the Government or themselves upon guard against the probable ultimate assertion of this claim.

Knowledge on the part of the Leybas of the passage of the act of July 22, 1854, and their right to file their claim with the surveyor-general and preserve their evidence is to be presumed. (*Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S., 573, 580.)

The United States as early as 1861 extended the public surveys over the same; no protest, no claim, no objection, and no step was taken to apprise anyone that the Leyba family in any way claimed an interest in this property adverse to the United States, or anyone

else. Although homestead entries were made upon the land; although as early as 1891 mining locations were made upon the same; although valuable turquoise mines were discovered, opened, and worked, still no claim and no protest was made by the Leybas, and probably no claim would have ever been made in any tribunal or in any office of the Government had not the turquoise mines been discovered and opened.

Sena, after acquiring the Leyba interest in 1895, did not seek the jurisdiction of the Court of Private Land Claims, but, standing upon his title, proceeded in the district court to assert it against McNulty, the manager of the Turquoise Company. Abandoning that court because of the overruling his application for continuance, he tardily sought this purely promissive jurisdiction, which must soon pass away by operation of law.

The land court was not created for the benefit of perfect grants; they did not need it, and should be held to the rule announced by Mr. Chief Justice Fuller in the case of *Hammond* v. *Hopkins* (143 U. S., 224, 250), viz:

> No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred.

In the case of *United States* v. *Martinez* (184 U. S., 441, 449), appealed from the Court of Private Land Claims from a money judgment for lands patented by the United States, which were located within the boundaries of a confirmed perfect grant, Mr. Justice Brown, in the opinion of the court, applying the doctrine of laches, as distinguished from the bar of the statute, said:

> Under the Court of Claims act petitions must be presented to that court within six years from the time the cause of action accrues (act of March 3, 1887, c. 359, 24 Stat, 505), and while there is no limitation of the time for petitions of this character to be filed in the Court of Private Land Claims, we have held that a similar act required that cases should be heard and disposed of upon equitable principles, and that we were "bound to give due weight to lapse of time." (*United States* v. *Moore*, 12 How., 209, 222; *Indiana* v. *Kentucky*, 136 U. S., 479, 509, 510.) We think there has been such unexplained delay in this case as to justify the court in holding that petitioners had abandoned their claim for a pecuniary judgment.

Applying the rule which pervades cases disclosing such facts as appear in this record, even if the title was complete and perfect at the date of the cession (1848), justify the court in holding that appellant and his predecessors, with whom he is in privity and upon whose rights his own must depend, did not intend to seek the recognition of their grant by this government, but elected to stand upon it as title paramount to that

of the United States and its grantees. He should be held to the legal consequences of such acts by permitting large and valuable interests to grow up under their very eyes without objection or protest.

## IV.

*This claim is void because of abandonment.*

This position is to some extent covered by the defense of laches, elsewhere urged, but it goes further and rests upon different principles.

But as tending to show that the entire area included within the boundaries, as delineated by appellant's sketch map, was not claimed at an early date, and as throwing some light upon the extent of the claim and occupation shortly after 1783, attention is called to the plat opposite page 162 of the record, which shows that the Cerrillos grant, confirmed and officially surveyed under the decree of the Court of Private Land Claims as a perfect grant, made in 1788 (R., 182–193), lies to a considerable extent within the claimed limits of this Leyba grant.

It is hardly probable that Leyba was occupying and asserting title under the will of his father to the limits now claimed, or otherwise the Cerrillos grant of 1788, five years after the death of Simeon Leyba, would not have overlapped it. In this instance it is a clear regrant to some one else of a portion of the land claimed by Sena as being the land of the Leybas. But as bearing upon the abandonment, the absence of

serious, open, exclusive, actual possession, anciently begun and consistently continued, the regrant of a portion under the Cerrillos grant is important. See the case of *Bergere* v. *United States* (168 U. S., 66, 84, 85).

It is said:

> The action of the Mexican Government in making grants to third parties of certain portions of these lands, as vacant and unoccupied lands, is also of some importance. The grants were made at times which were long subsequent to the petition of Baca and the making of the return by the alcalde, and were made after an official examination of the lands then granted and a certificate that they were vacant.
>
> We express no opinion as to the validity of these grants, and we allude to the subject only for the purpose of pointing out how the facts appear to the Mexican officials, who at that time were engaged in an investigation of the question of occupancy and who reported the lands mentioned in the respective grants as vacant and unoccupied, which we may assume they would scarcely have done had Baca or his heirs then been in the actual possession and occupation of those very lands.

It matters not why the owner has become dissatisfied with his land; his departure from it with the intention to abandon it caused it to cease to be his. This was clearly the Spanish law, and is succinctly stated in 1 Partidas, law 50, page 365, where it is said:

> If a man be dissatisfied with his immovable estate and abandons it, immediately he departs

from it corporally, with an intention that it shall be no longer his, it will become the property of he who first enters therein.

See—

*Landers* v. *Perkins* (12 Mo., 238).
*Fine* v. *St. Louis Public Schools* (30 Mo., 166).
*Tayon* v. *Ladew* (33 Mo., 205).
*Clark* v. *Hammerle* (36 Mo., 639).
*Sidest* v. *Duran* (67 Tex., 256, 262).

This land, abandoned long prior to 1846, passed to the United States as public land under the treaty of 1848.

After the treaty there was never any attempt by the Leybas to retake or reclaim possession. So far as this Government is concerned, if there was any need of a formal resumption of ownership analogous to the common law "office found," that was effected, as held in *Repentigny's case* (5 Wall., 211), cited supra, by the extension of the public surveys of the United States over this tract forty years ago.

Whether this title be treated as perfect or imperfect to limits of the outboundaries, it was certainly abandoned during the time it was subject to Mexican jurisdiction and subject to their laws governing such cases.

Juan Angel Leyba, after acquiring the property from his father on August 9, 1834, was killed by the Indians and possession never resumed under either government.

The following is a translation of a law passed by the most excellent departmental council of New Mexico on the question of abandonment, and duly promulgated.

ARCHIVE 1140.

Citizen Ramon Abreu, prefect of the first district of the department of New Mexico, makes known to the inhabitants thereof that the following has been communicated to him by the office of the secretary of said Government:

"Albina Perez, colonel of cavalry of the permanent army, governor of the department of New Mexico, makes known to the inhabitants thereof that the most excellent departmental council (junta) has seen fit to decree,

"First. Every individual who abandons the land upon which he has settled and which he acquired by grant, with the intention of establishing himself elsewhere to live there, and does not leave someone to take his place in ordinary labor, shall lose the real property he had acquired.

"Second. The acting justice of the peace will immediately give notice to this Government of those residents who go to live elsewhere, that it may be understood that the property the latter had may be donated to another.

"Third. These resolutions will be communicated, through the proper channels, to the municipalities of the department for due compliance therewith.

"Fourth. Those who, under articles first and second, incur the loss of their properties by abandonment, shall not have the right to take from the houses that have been theirs none of their appurtenances—that is to say, roofs, doors, and windows; but those who next occupy them are obligated to pay him the just amount of

their value in the same prices, kind, and other payment upon which they shall agree."

Therefore I ordered it published, circulated, and duly complied with.

Palace of the Government, in Santa Fe, July 20, 1837.

ALBINA PEREZ.

JESUS MA. ALARID,
*Secretary.*

And that it may come to the notice of all, and may be given the most exact and punctual observance, I order that it be published by proclamation in this capital and in the other towns and places of the district.

Given in Santa Fe, July 28, 1837.

RAMON ABREU [RUBRIC].

The first article of this law is but a reiteration of the Spanish law—that land vacant and abandoned was subject to be regranted to others, unless at the time possession was given the owner appeared and objected.

This law is equivalent to the resumption by the Mexican Government of all lands abandoned by the owners.

Abandonment is largely a question of intent. The facts disclosed by this record clearly show abandonment, *at least*, about the time of the promulgation of the foregoing law (1837), and no attempt was ever made by any of the Leybas to resume possession under either Mexico or the United States.

They are presumably chargeable with knowledge of such law, with knowledge of the cession to the United

States, with knowledge of the provision of law provided by the United States for their protection; hence the acquisition and establishing of adverse rights of great value raises the *conclusive presumption of law* that the original intention was to abandon, and the property so passed to the United States has been so treated for a half century, and claimant should now be estopped to assert the contrary.

V.

*The claim should be rejected for insufficiency of proof of boundaries.*

The familiar principle of law controlling this as well as other land claims is of course that there must be such proof of boundaries as will with reasonable certainty define and limit the thing claimed, differentiating it from other things of the same kind.

*United States* v. *Delespine* (15 Pet., 319).
*United States* v. *King* (3 How., 773).
*Aribaca Land and Cattle Co.* v. *United States* (184 U. S., 649, 652).

It is respectfully submitted that such proof has not been presented here. The only boundary proved by claimant with any suggestion of certainty is the San Marcos road, a boundary that could serve equally well at any other point along its length of 15 or 20 miles, standing as it does at the limits of the city of Santa Fe, 15 miles north of the tract claimed, and ending at the San Marcos Spring, which is a mile or two south of the tract claimed. The San Marcos road therefore

does not fix the location. Do the other boundaries fix it? The boundary named in the title papers on the north is "the lands of Capt. Sebastian de Vargas." Where these lands are has been the subject of much speculation for years past, but all of the conflicting theories on the subject, including that now urged by claimant, were finally submitted to the Court of Private Land Claims, and that court held that the lands of De Vargas were located entirely east of the road known as the Camino de en Medio, which the proof shows to be miles east of the tract here claimed.

Archive No. 640 (R., 177) shows that Sebastian de Vargas owned other lands south of Santa Fe as early as 1710, and a mere reference to lands of Capt. Sebastian de Vargas without showing their location furnishes no guide for decision.

Even if this were a claim otherwise entitled to confirmation, the court would be confronted at the very outset by the lack of a definite identification of a north boundary, and that fact would preclude a confirmation upon the familiar principle stated at the outset; but the lack of satisfactory evidence as to the lands of De Vargas is not all. The titles call for the lands of Juan Garcia de las Rivas as the west boundary. An archive introduced by claimant shows that a man named Miguel Garcia de las Rivas, the father of Juan Garcia de las Rivas, owned a piece of land somewhere west of this tract, known as the old Pueblo of La Cienega. That document states nothing about the boundaries of that tract. Assuming that these lands

descended to Juan Garcia from his father and thus come within the description of this grant document as to ownership, the fact still remains that there is absolutely nothing to show what is the east boundary of the sitio or tract called in 1701 the old Pueblo of La Cienega.

Archive No. 313 (R., 176) shows that Juan Garcia de la Rivas had acquired lands just south of Santa Fe as early as 1716. They are not near the Coyote Spring tract, and it all goes to more conclusively demonstrate the lack of any evidence from which the court can identify the lands to which it can say the legal title passed either under the Spanish or Mexican governments.

Unless this court is to indulge in utter conjecture on the subject, it must hold that claimant has wholly failed to establish his west as well as his north boundary. The title papers on the south call for the arroyo called the Arroyo del Oregano. Where is this natural object? Can anyone take the testimony as contained in this record and locate that object? The only two witnesses who attempted to establish the location of this natural object are R. B. Willison and Antonio José Campos, whose testimony has been above outlined. Willison fixes this natural object as an insignificant arroyo not more than a mile long, located eastward from the Coyote Spring and emptying into the arroyo in which that spring is located, a short distance east of that spring, thus leaving no part of the arroyo west of the spring. Campos, who was the

star witness for claimant, on the other hand, fixes the location of this arroyo about a mile and a half *southwest* of the Coyote Spring. This being all of the testimony locating this arroyo, what would a deputy surveyor do going out to locate that arroyo under the evidence? Would he locate it east of the spring, as Willison states, or a mile or more southwest of the spring, as Campos states? And if the proof is so irreconcilable as to make it impracticable to locate that arroyo by survey on the ground, how is this court to locate it upon the proofs? It is respectfully insisted that the record is radically defective in failing to afford the court data from which it can fix the boundaries of this claim. The sole intent of claimant seemed to be to make a location that would include the turquoise mines, and in rushing to the much-desired conclusion he has failed to produce proof to sustain that conclusion. It is this desire to attain an end without putting claimant to the trouble of establishing the intermediate steps that has betrayed him in this case to the absurdity of a claim for 18,000 acres upon title papers designed to contain half a fanega of corn-planting land, or about 4 acres. This discrepancy is illustrative of the results which follow an attempt to locate a grant without data as to its boundaries, and with only a single purpose, and that, the inclusion of a certain property of value. This discussion of the uncertainty of the boundaries has proceeded upon claimant's proofs alone. When it is recalled that, according to the

testimony of the Government witnesses, the lands of Juan Garcia de las Rivas, and the lands of Sebastian de Vargas, and the Arroyo del Oregano have never been known in that locality, within the memory of these oldest men of the community or by tradition, the conclusion becomes irresistible that the location sought by claimant is, to say the least, not sustained by the weight of the testimony required by the act of March 3, 1891.

The will of Simeon de Leyba and the deed from Salvador Antonio Leyba to Juan Angel Leyba, of the Coyote Spring ranch, if competent for the purpose of showing their claim of the general *locus* of the Leyba grant, does not aid in determining the north, west, or south boundaries. They are as uncertain and problematical now as they were before the case was tried. If the grant was complete and perfect at the date of the treaty, it must identify some particular land which had been definitely *segregated*, otherwise it must fail for want of an identified tract upon which to operate.

VI.

*The objection urged to the refusal of the court to suppress the depositions of Susano Leyba and others, the witnesses being in attendance at the trial, in no manner prejudiced the appellant's cause and did not deprive his counsel of the opportunity to call each of them for cross-examination, if he had so desired.*

Indeed, the motion made by counsel (R., 36) to require the Government to produce the witnesses whose

depositions had been read, for the purpose of cross-examination, "it having been shown that they are actually in attendance on the court" (R., 134–135), was fairly met by the court.

While declining to compel the Government to call these witnesses for cross-examination, the court clearly notified counsel that if the witnesses were in attendance, he might call them himself for cross-examination or any other purpose which he might deem advisable.

If the witnesses were not in attendance, the process of the court was not refused to bring them in, in order that he might subject them to cross-examination. In fact, counsel studiously avoided asking for process, and declined to call a single one of them (although in attendance) for the purpose of cross-examination.

This manner of attempting to make error, and complaining of the denial of rights prejudicial to his client's case, scarcely appeals to the indulgence of an appellate tribunal dealing with a record according to justice and right.

The notable liberality of the Court of Private Land Claims in the reception of evidence, and the total absence of technical or captious rulings upon objections of every kind, disarms this studied attempt to make reversible error.

The depositions were taken before one of the justices upon proper application and due notice to appellant's counsel, and if he desired to cross-examine these witnesses, it was simple enough to call them and ask permission to cross-examine, which would, no doubt, have

been granted. At least he should have made the attempt.

The proceedings and practice before that court have been of necessity liberal, and the manner of obtaining and receiving evidence by deposition could not be governed by such rules and limitations as required by sections 865 and 866, Revised Statutes, United States.

The private land claim act of March 3, 1891, provides, section 7: "That all proceedings subsequent to the filing of said petition shall be conducted as near as may be according to the practice of courts of equity of the United States, except that the answer of the attorney of the United States shall not be required to be verified by his oath, and except that, as far as practicable, testimony shall be taken in open court or before one of the justices thereof."

These depositions were taken before Mr. Justice Stone and complied with the letter and spirit of the act, and there was no occasion for repetition.

If counsel desired to submit the witnesses to cross-examination, he should have called them and asked permission to cross-examine. Having studiously avoided this course, he should not now be heard in complaint.

In conclusion, this claim seems to be brutally speculative, without a single equity appealing to the sympathy or conscience of the chancellor, and which in each feature and characteristic shocks every idea of right when dealing, "*according to justice and right*," with public or private rights of property; and it is submitted

that the decree should be affirmed or reversed and remanded with direction to dismiss the petition for failure, on the part of Sena, to sustain his claim as a perfect grant by a preponderance of the evidence.

Respectfully submitted.

JOHN K. RICHARDS,
*Solicitor-General.*

MATTHEW G. REYNOLDS,
*Special Assistant to the Attorney-General.*

WILLIAM H. POPE,
*Special Assistant to the Attorney-General.*

EDWARD L. BARTLETT,
*Of Counsel for American Turquoise Company and John T. McNulty.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1902.

*No. 40.*

*IN EQUITY.*

MARIANO F. SENA, PETITIONER AND APPELLANT,

*vs.*

THE UNITED STATES, ET AL., DEFENDANTS.

*On Appeal from the Court of Private Land Claims.*

JAMES W. VROOM,
Attorney of the Defendant,
L. Bradford Prince.

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*On Appeal from the Court of Private Land Claims.*

**This brief is filed on behalf of the defendant L. Bradford Prince, and for the purpose of raising the question of the jurisdiction of the Court of Private Land Claims to adjudicate the grant to Jose de Leyva here in question.**

## STATEMENT OF THE CASE.

This is an appeal from the final decree of the Court of Private Land Claims in the matter of the petition for the confirmation to the legal representa-

tives of Jose de Leyva of a grant of land located in the territory of New Mexico made to the latter in the year 1728.

The court below decided that the grant was an imperfect grant; that the petition for confirmation had not been filed within the time limited by the statute creating the court; and that therefore the grant was barred, and dismissed the suit for want of jurisdiction.

The translation of the original grant papers will be found on page 112 of the record. These consist of the petition, the grant by the governor, and the paper of juridical possession. A sketch map of the grant will be found at page 2.

These papers constitute the protocol, or original papers, of grant; they were produced from the archives of the United States surveyor general's office of New Mexico, and were admitted in evidence by the court below.

The attorney for the United States objected to the admission of these papers in evidence, because they were the protocol and not the testimonio, the original and not the copy of the grant. (Record, 11.)

Notwithstanding the reception in evidence by the court below of the protocol of the grant to Leyva, the attorney for the United States undertook to prove that no such grant had existed by introducing the testimony of a number of aged residents of the vicinage, who testified that they knew of no such grant, and had never heard of it from any person.

One specimen of this character of testimony, that of Nazario Gonzales, will, I conceive, be all sufficient.

He testifies as follows: (Record, 136.)

> "Q. Since you have been living down there at Cienega, during these forty or fifty years, have you ever heard in that vicinity of a grant called the Jose de Leyva grant? A. No, sir.
>
> "Q. Have you ever heard any one down there, or anywhere else, claiming a grant called the Jose de Leyva grant? A. Never; not to my own knowledge, nor by tradition, have I ever heard about this."

Under the Spanish law property may be acquired by immemorial prescription, which is proved by witnesses of good fame or character, who depose to having seen the person in possession of the thing or property for forty years, and having heard their ancestors say that they never saw nor heard anything to the contrary (2 White's Recop., 83); but there is no rule of law, either civil or common, by which a grant of land, accompanied by the delivery of juridical possession of the land granted, could be questioned, much less destroyed, by the testimony of aged witnesses, even of Methuselah's longevity, that they did not know of such a grant, nor had they ever heard of it in the vicinity. Such a rule of law can not be found in either Starkie, Phillips or Greenleaf, nor in Lieber or Bentham; it may possibly be found in Horace Walpole's Historic Doubts on Richard the Third, or more probably in Archbishop Wateley's Historic Doubts as to the Existence of Napoleon—but these works are not in [redacted] law library.

The introduction on behalf of the government of such testimony in the case of a grant of land in ceded territory, to which, as this court has said, the United States made no pretense of ownership, might have been treated with gentle tolerance, and attributed to the zeal of the attorney to "save" to the United States this land which had been granted by Spain in 1728, or left to the rebuttal which the attorney for the appellant saw fit to introduce; but when the court below not only admitted such testimony, but in part based its decision rejecting this grant upon it, saying that

> "the evidence as to * * * claim of ownership, notoriety of the grant, and knowledge of its existence in the community by the oldest inhabitants now living is so vague, contradictory, and uncertain as to be almost wholly wanting" (Record, 240),

the whole proceeding becomes so astounding in its violation of the settled rules of law that it may be properly and fitly characterized, with all due respect to the court below, in the language of Lord Tennyson, as

> "Ruining along the illimitable inane."

The last will and testament of Simon de Leyva, the son of the original grantee, was executed in the ranch house on this grant October 15, 1783. It was discovered in the archives of New Mexico after the hearing below, and was allowed to be put in evidence by the order of this court. By it Simon devises the

grant made to his father in 1728 to his only child, Salvador Antonio, reciting the boundaries of the grant substantially as they are given in the original petition.

The west boundary of the grant is given in the original petition as "the lands of Juan Garcia de las Rivas," which are shown on the map of the grant facing page 2 of the record, but which are omitted from the map offered in evidence by the government found facing page 162.

The attorney for the United States, on the hearing below, assumed that the west boundary of this grant to Leyva was not what the protocol of the grant stated it to be, but that it was the road to Galisteo. Having presumed this boundary, the whole power of the government was employed to attempt to demonstrate that that road ran as located on the map offered by it, and not as located on the map produced by the petitioner; that is, to the east, and not to the west of the *Cerrito Palado.*

When the United States, as already said, made no pretense to ownership of these grants of land acquired by treaty of cession, when they were in question before a tribunal in which it consented to be made a party, the solicitude of the attorney for the government to create a west boundary for this grant other than that granted by the king of Spain one hundred and seventy-two years ago, as was proven by the protocol of the grant in evidence before the court, is inexplicable. Nor does the fact that this purely imaginary west boundary, as attempted to be created by the government, excludes from the grant to Leyva the *Cerrito Palado*, the hill which contains the tur-

quoise mines so long and so profitably exploited, without title, by the American Turquoise Company, afford any explanation of the circumstance.

It does not seem to me, however, that the question of boundary is for consideration on this hearing. The sole question is, whether the grant to Leyva was perfect or imperfect. And to this I ask leave to add one other, Whether the Court of Private Land Claims had jurisdiction over the grant in either case?

Before considering, however, the question of the jurisdiction of the court below, it will be necessary for me to briefly consider the nature and character of the grant to Leyva.

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## BRIEF AND ARGUMENT.

I. The grant to Jose de Leyva was a perfect grant

First—By the grant.

Second—By prescription.

The grant to Jose de Leyva of a tract of land, located in what is now Santa Fe county, in the Territory of New Mexico, was made in the year 1728 by Bustamente, the then governor of the Province of New Mexico, juridical possession having been given on May 25 of that year.

The governor of that province had, in 1728, the power to make grants of land within his jurisdiction on such considerations as seemed to him best, and, in so doing, to confer a perfect title. From its exercise the court will presume the power, and cast the burden

of proof upon the party denying it to show that the power had been transcended.

Strother vs. Lucas, 12 Pet., 410-437.

The governors of New Mexico were appointed by the king of Spain for a term of five years (Bancroft's New Mex., 242-256-268); they were not appointed by the viceroys of Mexico, consequently they were the *alter ego* of the king and not sub-delegates of a delegate. Their acts were the acts of the king and alone subject to his sanction or disapproval.

The governor having made the grant to Leyva, and juridical possession having been given to the grantee, it, in 1728, required no confirmation at his hands or at those of the king. The title became complete and perfect by the act of grant, and the grantee acquired all the title the king could give.

Menard's Heirs vs. Massey, 8 How., 293-303.

Farther it appears by the preamble to the Royal Regulations of October 15, 1754 (2 White's Recopilacion, 62; Reynold's Compilation, 50), that by a decree of November 24, 1735, the king ordered that grants *thereafter* made in New Spain were to be forwarded to him for confirmation. The cost and inconvenience, however, of such procedure was found to be so great that it was abrogated by those regulations, and the power of making grants of land in the provinces was restored to the various officers who had theretofore exercised it. From these considerations also it is proven that in 1728, when this grant to Leyva was made, the governor having the power to

make grants of the public domain, a confirmation by the king was not requisite to perfect the grant title, but that the governor could confer a perfect title by his own grant made in the name of the king.

United States vs. Clarke, 8 Peters, 436-401.
Strother vs. Lucas, 12 Peters, 410-438.

In speaking of grants of land of the character of the one under consideration, the Supreme Court in United States vs. Clarke, supra, on page 150, say:

> "These titles are to be valid to the same extent as if the territory had not been ceded. What is that extent? A grant made by a governor, if authorized to grant land in his province is *prima facie* evidence that his power was not exceeded. The connection between the crown and the government justifies the presumption that he acts according to his orders. Should he disobey them his hopes are blasted, and he exposes himself to punishment. His orders are known to himself and to those from whom they proceed, but may not be known to the world. Such a grant, under a general power, would be considered as valid, even if the power to disavow it existed, until actually disavowed. It can scarcely be doubted, so far as we may reason on general principles, that in a Spanish tribunal a grant, having all the forms and sanctions required by law, not actually annulled by superior authority, would be received as evidence of title."

These rules of construction are strengthened by another consideration. The king of Spain individually was held to be the owner of all the lands of the new world; it was his personal domain (Schmidt, Civil Laws of Spain, 92; Mobile vs. Esclava, 9 Porter (Ala.), 593; affirmed, 16 Pet., 234). From these possessions he derived a large part of his revenues, and the laws promulgated by him were largely framed for the accomplishment of that purpose and for the settlement of the country. It can not be questioned that he was notified of all that was done by his officers in granting his personal domain. This fact, in the absence of proof, would in ordinary cases be presumed. But when the laws of Spain enjoin such information to be given, the comity of nations requires the courts of the United States to conclude that what the laws of a foreign nation prescribed was executed by the officers and tribunals of that country.

In Book 3, Title 14, Law 13, of "*Las Leyes de las Indias*" (2 White's Recop., 40), it is provided:

> "We command the viceroys and presidents on all occasions to transmit to us specific and particular information of all deserving persons who expect rewards for services rendered, * * * with the qualifications and circumstances of each, and of such persons as they may have rewarded, and the motives for doing so."

Again, in Book 4, Title 6, Law 7 (2 White's Recop., 45), it is provided that the viceroys and presidents shall keep a secret register of rewards,

> "where shall be recorded for reference the names of all persons applying, with a summary account of their merits and services, together with what they shall do to reward them, and their motives for the same; all which shall be signed by them, and certified by the secretary of government. Each year they shall transmit to our council a statement of all that they have done in the year."

The king of Spain, therefore, was bound by his knowledge of, and consent to, this grant to Leyva as a perfect grant, made and confirmed by lawful authority, acting under and for him and in his name; and the United States, in acquiring the province of New Mexico by treaty of purchase, became in law equally bound.

While this grant was perfect, it was made subject to one condition, which is expressed in the paper of grant made by the governor, namely:

> "Providing he shall settle it within the time provided by the royal ordinances."

This was a condition subsequent. Such conditions are either expressed in the paper of grant, or they are to be implied from existing laws. It is an elementary principle of law that when the condition is subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant (2 Blackstone's Com., 156); or, as Chancellor Kent states it:

> "Subsequent conditions are those which operate upon estates already created and vested, and under them liable to be defeated." (4 Kent's Com., 125.)

The fact that this grant contained a condition subsequent embodied in the paper of grant, did not, therefore, affect the estate granted. It was a perfect grant, subject to a defeasance, and such defeasance was only enforceable both at civil and common law by some procedure in the nature of office found.

> "There is no doubt," says the Supreme Court of Texas, in Hancock vs. McKinney, 7 Tex., 384-456, "that in practice under the Spanish law, when grants of land were made upon conditions, if the conditions were not performed, any one might denounce them, prove the forfeiture, and apply and have the lands granted to himself. But then it devolved upon the party denouncing to prove the forfeiture." (2 White's Recop., 278, section 9.)

Judge Field, while sitting as a justice of the Supreme Court of California, says, in Ferris vs. Coover, 10 Cal., 589-615:

> "The object of the decree of 1824 and the regulations of 1828 (of Mexico, which are similar to the laws of Spain, and based upon them) was the settlement of the vacant lands of the republic, and for that purpose grants like the one to Sutter were subject to the con-

ditions of cultivation and occupancy. * * * But it is immaterial whether we consider these conditions as intentionally omitted, or as annexed to the grant by force of the regulations. They are conditions subsequent, for the non-performance of which the estate might have been defeated by proceedings of the government to that end; but until such proceedings were had, and a forfeiture declared thereon, the estate remained in the grantee. Under the Mexican law, as under the common law, an estate granted by the government could not afterwards be devested upon mere allegations or surmises. Some former and regular proceedings were necessary. Under the Mexican law they had their inception in what is termed a denouncement by a party desirous of acquiring the land. When the denouncement was made, an investigation was had whether or not the conditions had been complied with, or so disregarded as to authorize a declaration of forfeiture. No re-grant was made upon mere allegation that the conditions of the former grant had not been performed, without an inquisition as to the fact."

Hornsby vs. United States, 10 Wall., 240.

Farther, the effect of the delivery of juridical possession was to separate the land granted from the pub-

lic domain, and to vest the title absolutely in the grantee against the government.

United States vs. Malarin, 1 Wall., 290.
Graham vs. United States, 4 Wall., 260.
United States vs. Pico, 5 Wall., 536.

The court below did not base its decision on a denouncement and forfeiture of this grant. The burden of proof would then have been upon the government, which did not, and could not, produce evidence to sustain such contention. The court, instead, decided that the grant became imperfect because of an alleged and suppositious breach of conditions, which it professed to find in the Royal Regulations of 1754. The construction of these regulations will later be fully treated, and need not be here considered.

The condition subsequent embodied in this grant to Leyva was, as we have seen, that of lawful "settlement." Juridical possession of the land granted having been delivered to Leyva on May 25, 1728, settlement will be presumed until the contrary is shown, and the burden of proof to establish the breach of a condition subsequent is upon the party alleging it. (Per Hemphill, C. J., in Hancock vs. McKinney, 7 Tex., 384-459.)

Four years' settlement would give the grantee what is termed at common law an absolute, fee simple title. (2 White's Recop., 43.) The power was thenceforth conferred upon the grantee to sell and make use of the land freely, at his will, as a thing of his own. (2 White's Recop., 283.)

It will appear, on examining the opinion of the court below, that in deciding this grant to have become imperfect in 1754, it became necessary for the

court to admit that the grantee, or his legal representative, was, in that year, in possession of the lands granted in 1728. Hence, we have an admitted possession of the lands granted to Leyva not of four but of twenty-six years; a possession by a perfect title which could not be aided nor destroyed by an act of the king of Spain or the republic of Mexico, or by that of the United States, as their successor.

From the admitted fact of this possession, it appears that,

Second, the grant to Leyva was a perfect grant by prescription.

The doctrine of prescription under the laws of Spain has but little analogy to the limitation upon civil remedy at common law, embodied by the legislative power in statutes, termed statutes of limitation. Nor is it analogous to the prescription of incorporeal hereditaments, which the common law recognizes where title is acquired by immemorial or long continued enjoyment; although the seigniory, or dominion, of cities, towns, and civil and criminal jurisdiction could be thus acquired against the king by a possession of forty years.

The law of Toro provides, that "the time in which things are prescribed is comprehended under two kinds of prescription—immemorial and temporal. The first is proved by witnesses of good fame, or character, who depose to having seen the person in the possession of the thing or property for forty years, and having heard their ancestors say they never saw or heard anything to the contrary." (1 White's Recop., 95.)

It would seem, strictly speaking, that the rule of immemorial possession was by the civil law alone applied to municipal titles and rights, such as the seigniory of cities and towns, and civil and criminal jurisdiction, though it would seem to have been applied by the Supreme Court of Texas to ordinary grants of land. A royal decree concerning crown lands was promulgated July 16, 1819, by which it was provided, "Second, In the absence of other title, a just prescription, that is a possession of forty years, duly proved according to law, shall be admitted and respected." But this decree seems, from its language, to have been limited to the island of Cuba. (2 White's Recop., 502-550.) However, the doctrine and the mode of proof can have no application to the grant under consideration, in which the grant and the juridical possession of the land granted are, by the court below, admitted to have been proved by the production from the proper archives of the protocol, or original papers of grant.

Prescription or usucaption, according to the civil law as embodied in the laws of Spain, was a civil mode of acquiring dominion and ownership of anything by having possession of it during the whole time that the law directs. The requisites to prescription are five: First, just title; second, good faith; third, continued possession; fourth, the time fixed by law, and fifth, that they be not vicious; that is, that there be no impediment to its being prescribed (2 White's Recop., 733).

All of these requisites are found united in the grant to Leyva.

We farther find that under the Spanish law (Ib., 734) "things moveable are prescribed by three

years; real by ten between present, and twenty between absent persons."

The law of prescription applied to the king as well as to the subject. He was, as we have seen, regarded as the personal owner of all the lands of New Spain. The maxim of *nullum tempus occurrit regi* had no application to him. It was of feudal origin, which system was never introduced into Spain, hence the maxim can not be applicable in the consideration of Spanish grants, and in their construction the courts will apply the laws and customs of Spain, not the rules and maxims of the common law.

United States vs. Arredondo, 6 Pet., 714.
Buyck vs. United States, 15 Pet., 215.
United States vs. Aguisola, 1 Wall., 352.

The rationale of the English maxim will be found in Baldwin's Constitutional Views, 142 (U. S. Rep. Lawyers' Co-op. Ed., supplement to 11 Peters), which will fully illustrate the inapplicability of the maxim to the sovereigns of Spain.

If we regard the king as present in the persons of his governor, his *alter ego*, the time of prescription would be ten; if absent, twenty years. In either event the grantee, Leyva, had acquired by prescription, in 1748, a perfect title, which could be destroyed by neither the king of Spain nor by the United States.

I do not attach much weight to the civil law rules of prescription in the construction of this grant; at most they could but furnish adventitious aids. I have treated of them at some length more for the purpose of demonstrating that a prescription of forty years could have no application to this grant, but was

only applicable to cases of municipal rights, and possibly to cases where a grant was to be presumed, in the absence of grant papers, by proof of long continued and exclusive possession. In the present case, in which the grant papers are produced and received in evidence by the court, the title would be, if necessary, perfected by twenty, if not by ten, years' possession.

But it might be suggested, as was done, we think unadvisedly, in Paschal vs. Perez (7 Tex., 348-370), that the Royal Regulations of 1754 prescribed in its fourth section a rule of prescription of fifty-four years, applicable to grants made in New Spain after the year 1700. An examination, however, of this provision will show that the rule is alone applicable to grants of land made "before the year 1700," and to cases in which "persons have not warrants, their long possession shall be held as a title by prescription."

But if any considerations could arise as to the duration of the possession of the land granted in 1728 to Leyva, by which the title to this grant could be injuriously questioned, they are resolved by the opinion of the court below, in which it, in laying the foundation for the rejection of the title to this grant, was compelled to decide that the grantee was in possession of the land granted in 1754, the date of the Royal Regulations, when this perfect grant was imagined by the court to have been transmuted, after a possession of twenty-six years, into an imperfect one.

The Court of Private Land Claims did not decide that the grant to Leyva was, when made in 1728, an imperfect grant; it did not decide that the grant had at any time been abandoned; it did not decide

that the land granted had become revested in the king of Spain or the republic of Mexico; it did not decide that the grant had been denounced, forfeited and re-granted under the provisions of the Royal Regulations of 1754; it baldly decided that the grant became imperfect because of an alleged, supposititious and unproved failure to comply with those regulations.

From the opinion of the court below it is, therefore, most clearly and incontestably established, that a grant of land was made to Leyva in 1728; that juridical possession thereof was at that time given to him; that the grantee, or his legal representative, was in lawful possession of the land so granted in 1754, and presumptively continued in possession thereof, under some title, at the time of the filing of the petition in the Court of Private Land Claims, and at the date of the final decree in April, 1900. Altogether, a possession of one hundred and seventy-two years, one hundred and twenty of which was under Spain and Mexico, and fifty-two years under the government of the United States. Notwithstanding these facts, admitted by the court below in its opinion, the court decided that the grant become imperfect in 1754, and so continued until 1848, when the territory was ceded to the United States, a peaceable, continuous, unquestioned possession under Spain and Mexico of ninety-four years, under a title that was and remained imperfect. The court evidently held that to this grant the law of prescription could never apply.

II. The grant to Leyva was perfect when the land was granted to him, in 1728; it could not, and did not, become imperfect under the provisions of the Royal Regulations of 1754.

The purpose of these Royal Regulations was threefold:

First—To restore to the viceroys, delegates and governors the power to make and confirm grants of land in New Spain, without the approval of the king, as that power had existed prior to the Royal Order of November 24, 1735.

Second—To cause certain of the titles and patents by which grantees held possession of lands under the king to be exhibited to the proper and designated officials, so that the grantees might, when so required by the regulations, be confirmed in their possession.

Third—To deprive and eject grantees from lands occupied by them, if they failed to exhibit their grants or warrants for such possession within the time specified, and to grant such lands to other persons.

These regulations, so far as they related to the investigation of the possession by grantees of lands held under the king, were neither novel nor extraordinary. The king of Spain always exercised the right of requiring persons who held grants from the crown to come forward, at such time and in such manner as he deemed proper, and prove the character and extent of such possession. We find similar regulations in the *Recopilacion de Leyes de las Indias,* which were promulgated by Charles II., in 1682 (2 White's Recop., 52), and we shall see later that the provisions of the Regulations of 1754 in this regard were specifically renewed by the Ordinance of Intendants of 1786.

The former law reads as follows:

> "Whereas, We have inherited fully the dominion of the Indies; and, whereas, the waste lands and soil which were not granted by the kings, our predecessors, or by ourselves, in our name, belong to our patrimony and royal crown, it is expedient that all the land which is held without just and true titles be restored as belonging to us, in order that we may retain"

sufficient lands for granting for various enumerated purposes.

The law continues:

> "For all this we order and command the viceroys, presidents and pretorial audiences, whenever they shall think fit, to appoint a sufficient time for the owners of land to exhibit before them and the ministers of their audiences, whom they shall appoint for that purpose, the titles to lands, estates, huts and cabellerias, who after confirming the possession of such as hold the same by virtue of good and legal titles, or by a just prescription, shall restore to us the remainder, to be disposed of according to our pleasure."

The object of these regulations, as well as those of 1754, was the restoration to the crown of the royal lands, the possession of which was held, not by grantees with a just title, but by persons without warrant or title, so that they might be disposed of by the king;

not as the court below decided respecting the perfect title granted to Leyva, the validating of valid titles, which would have been as idle as gilding refined gold, and as futile as were the efforts of the astronomers of the academy of Lagoda to extract sunshine from cucumbers.

Evidently the court below, disregarding the maxim of the civil law, that property once acquired is lost only by the act of the owner (2 White's Recop., 99), considered property and possession, which jurists in primitive ages confounded, as identical. Property is, however, a right; possession a fact. The Royal Regulations of 1754 dealt alone with the fact of possession. If that was founded upon a just title, the designated officers could neither make nor unmake the royal grant, nor could they add to or subtract from it. The king could not confer upon another a power which he himself could not exercise. If the grant was perfect, it remained so; if the possession rested simply upon the fact of possession and not upon the right of property, such possession, unless perfected by prescription, was subject to denouncement, and the land so occupied was regranted to another. Under these principles of the civil law the Royal Regulations of 1754 are to be construed.

These regulations provided, by article III, for the submission to and examination by delegates of the king, the delegate in New Mexico, as appears by article XII, being the governor, of the evidence of title to the royal lands which had been possessed

> "from the year 1700 till the day of the publication of said order,"

so that the possessors of such lands

> "may prove before the sub-delegate * * * the titles and patents in virtue of which they hold their land. For this exhibition an adequate time shall be fixed, proportioned to the distances; and notice shall be given that they shall be deprived of, and ejected from such lands, and grants of them made to other persons if they failed to exhibit their warrants within the limited time, without just and proper cause."

It was further provided, by article IV, that on the warrants of those whose grants were made prior to the year 1700,

> "it shall be noted that the persons have complied with the obligations of exhibiting them, so that they may not in the future be disturbed in or sued for their royal lands, they nor their successors."

No such provision was made for grants made subsequent to 1700, and it will be seen by article X that none were contemplated. This latter article has no application to the province of New Mexico, in so far as the reports to be made to the audiencias. The governor made no such reports.

From these requirements to exhibit muniments of title to warrant the possession of the royal lands, one class was exempted by article V, namely:

> "The holders of land sold or adjusted by the several deputies from the year 1700

> up to the present time shall not be molested, interfered with, nor denounced, now, nor at any time, if it appears that they have been confirmed by my royal person, or by the Viceroys and Presidents of the Audiences of the several districts, in the time when this requirement was in force; but those who hold them without this necessary requisite shall apply for the confirmation thereof to the Audiences in their district or to the other officers to whom the power is given by these new instructions." (Reynold's Comp., 53.)

These regulations do not specify how the fact that the grant had theretofore been confirmed was to be ascertained; but it was ascertainable from the archives of the government in which the protocol, or original paper of grant, was by law to be deposited. (Farmer's Heirs vs. Esclava, 11 Ala., 1028; approved, 9 How., 421.) That the protocol was in this case so deposited appears from the opinion of the court below, in which it is said: "The title papers and documents produced from the archives of the surveyor general's office, and received in evidence in this case," etc. This having been the fact, there was no necessity for the grantee to produce the testimonio, or copy of the grant, which had been given to him by the government as evidence of title. The fact that the possession of the grantee, which alone, under the regulations, was in question, needed no confirmation, was ascertainable, and presumptively ascertained, from the government archives. This presumption of

law is sustained by the continued and uninterrupted possession of the grantee, and from the fact that the United States could, on the hearing below, produce no evidence that Leyva's possession had been "molested, interfered with, nor denounced," which was expressly forbidden by the provisions of the same article in the case of perfect grants.

We find from the decision of the court below that Leyva was in possession of this grant in 1754, and, presumptively, his legal representatives so continued until the entering of the final decree by the court in 1900. Simon de Leyva, the son of the original grantee, by his last will and testament, dated October 15, 1783, devised this grant of land to his only son and sole heir, Salvador Antonio.

This will was not introduced on the hearing before the Court of Private Land Claims, not having been until afterwards discovered in the archives at Santa Fe, New Mexico. Application was, however, made to the United States Supreme Court, under section 9 of the act entitled "An act to establish a court of private land claims and to provide for the settlement of private land claims in certain States and Territories," approved March 3, 1891 (26 Stat., 854), for leave to take additional testimony. In denying the motion, the court decided that a certified copy of the will of Simon de Leyva might be introduced at the hearing.

The following are extracts from this will:

> "Finding myself at my ranch (which was on this grant) far from my house (in Santa Fe), and having received a mortal

blow from an unbroken mule, and believing myself unable to survive, nor my body to be moved, I command and order before dying my last will of my testament be made, that all may see it in the following form, towit:

* * *

"Item: I declare that I have been married and nuptially blessed according to the rules of our Holy Mother Church with Feliciana Gonzales, already deceased some years, in which marriage we procreated one son, Salvador Antonio, whom I recognize as my sole heir. * * *

"Item: I declare that I have a grant of lands given by the king of Spain to my deceased father, Jose de Leyva, in 1728, and its boundaries are as follows:

"On the south the slope (*cuesta*) called the Arroya of the Oregano; on the north the road which goes towards Pecos from Los Cerrillos, or lands of Captain de Vargas; on the east with the road which goes from Santa Fe to the spring of San Marcos; on the west with the lands of the old Pueblo of La Cienega, as appears by the original papers which are to be found in the trunk in my residence in Santa Fe.

"On said grant there is constructed a ranch at the Coyote spring, a small house, two rooms and a small kitchen; a little tower (*torreon*); a large corral of poles; two corrals for young animals; a corn crib, not very large, with corn and beans; a hut (*jacal*) in

the temporal lands. There is at my ranch my farming tools, six plows, two axes, two hoes, six yokes, three ox goads, one loom, one spinning wheel, three skeins of silk, two wool cards, one adze, four pairs of yoke straps, one riding saddle complete."

This testament establishes beyond controversy the lawful and continuous possession in Leyva and his son of the land granted from 1728 to 1783, a period of fifty-five years—twenty-nine years of which were after the date of the Royal Regulations of 1754, at which time the court below decided the grant became transmuted into an imperfect grant. It is in itself an answer to all the objections to the grant as a perfect one advanced by the court below in its opinion.

Let us now examine in detail the decision of the court below respecting the character of this grant, and the construction placed by the court upon the Royal Regulations of 1754 as affecting the grant.

The court say:

"The title papers and documents, produced from the archives in the surveyor general's office, and received in evidence, show that the grant in question was made to Jose de Leyva by the governor and captain general, Bustamente, in the name of the king of Spain, in the year 1728; and that juridical possession was formally given to the grantee of the land petitioned for and granted."

From this it appears that the title papers were:

First—Produced from the proper archive.

Second—That they were received in evidence by the court as proof that a grant of this land had been made to Leyva, and juridical possession thereof given to him.

Thus the requirements of the statute creating the Court of Private Land Claims relating to proof of title, as construed by the Supreme Court in United States vs. Ortiz, 176 U. S., 425, were complied with.

From the grant papers which were thus received in evidence it must be presumed, as we have already shown,

First—That the governor had the power to make the grant.

Strother vs. Lucas, 12 Pet., 410-437.

Second—That upon the giving of juridicial possession the grant became complete and perfect, and the grantee acquired all the title the king could give.

Menard's Heirs vs. Massey, 8 How., 293-303.

Notwithstanding these facts, and the presumption of law flowing from them, they are disregarded by the court below, which, in its opinion, continues:

"The evidence as to settlement and occupation of the tract purporting to have been

> granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant, and knowledge of its existence in the community, or by the oldest inhabitant now living, is so vague, contradictory and uncertain as to be almost wholly wanting."

This paragraph, which the learned judge, farther on in his opinion, characterizes as "the state of facts presented," would seem to indicate that the court below had misapprehended, or, at least, misconstrued, the rules of property under the laws of Spain.

If those laws required of the grantees of the royal lands

> "settlement and occupation of the tract purporting to have been granted, continuity of possession, residence, improvement,"

and the court nowhere indicates any law embodying these requirements—the general reference to the whole body of the Spanish law being inconclusive, then these requirements were, of necessity, conditions subsequent, which were to be , and could only have been performed, after the estate had vested. They did not affect the estate granted, though the non-fulfillment of them might afford ground for forfeiture.

If the United States alleged that these conditions subsequent had not been performed, and that thereby the grant had been forfeited, or become "imperfect,"

as the court decides, the burden of proof was upon the government to prove the facts alleged.

Hancock vs. McKinney, 7 Tex., 384-456.
Ferris vs. Coover, 10 Cal., 589-615.

The Court of Private Land Claims, however, attempted to shift the burden of proof upon the grant claimants. The learned judge who delivered the opinion of the court says:

> "The evidence as to settlement and occupation, continuity of possession, etc., * * * is so vague, contradictory and uncertain as to be almost wholly wanting."

The rule of law, however, in such cases was correctly stated by Hemphill, C. J., in Hancock vs. McKinney (7 Tex., 384-459), in which he says:

> "As to the burthen of proof, when the title is attacked or lands denounced for want of performance of conditions, I apprehend that would depend upon the character of the conditions. If they be precedent, the party who sets up the title must show performance; if subsequent, the onus rests upon the party alleging the failure."

But, assuming, as the court below does, that the burden of proof was upon the grant claimant—"settlement and occupation" were proved on the hearing by the paper of juridicial possession, which the court admitted in evidence; "settlement and occupation * * * continuity of possession," by the admission

of the court that the grantee was in possession of the land granted in 1754, when by the royal regulation of that year the grant became "imperfect," and by the will of Simon de Leyva, the son of the original grantee, made October 15, 1783. Further "continuity of possession, cultivation, residence, improvement" need not be proved by the grantee when there was, as in this case, a possession evidenced by the papers of grant. In Ferris vs. Coover (10 Cal., 589-631), the court, in construing the laws of Spain and Mexico, says:

> "When there is a title, to preserve it there need be no continuance of possession, and the abandonment of the latter can not affect the rights held by the former."

See also

2 White's Recop., 283, "sixth."

In answer to the objection made to a grant in Florida, that there was no proof of cultivation, the Supreme Court in United States vs. Morant (123 U. S., 335-341), says:

> "As to not cultivating the land, it was proved conclusively on the trial that the grantees actually built houses and resided upon it shortly after the date of the grant."

This was held sufficient proof. In this case it is now proven by the will of Simon de Leyva, that in 1783, fifty-five years after the grant was made to his father, he was occupying and cultivating the land,

that there had been built thereon corralls and a house, and that he died in the latter in that year.

The court below entirely ignores the legal effect and operation of the delivery of juridical possession of the land granted under the laws of Spain. We have already shown from the decisions of the Supreme Court that the effect of such delivery was to separate the land granted from the public domain, and to vest the title absolutely in the grantee against the government.

Possession under the Spanish law is defined in the *Manual del Abogado Americano*, as quoted in 2 White's Recop., 734.

> "Eighth. Possession is the legal holding or enjoyment of a thing with the intention of excluding others from using it. It is divided into natural and civil. Natural is that which one has corporally by himself, as when he is in his house, or inheritance; civil, that which one has by disposition of the law when he goes out of his house or inheritance, not with the intention of divesting himself of the possession of it, but because he can not always be in it.
>
> "Ninth. Every man of sound mind may gain possession by himself, by his son, whom he may have under his control, and by his attorney.
>
> "Tenth. In order to acquire possession two things are requisite; first, the intention of gaining it; and, secondly, the entering into it corporally by one of the modes of delivery

which we explained in No. 11 of the preceding title."

Possession is the foundation of every title, and whatever its origin or the nature of the evidence of title, it all depends on some antecedent possession.

> "Undoubtedly, if a person be found in possession of land, claiming it as his own in fee, it is prima facie evidence of his ownership and seizin of the inheritance."
>
> Ricard vs. Williams, 7 Wheat., 106.

Possession is presumptive evidence of seizin in fee until the contrary is shown.

> Jones vs. Bland, 112 Pa., St., 181.

In any possessory action, proof of prior possession is sufficient against a mere intruder who fails to show a better title in himself. Such an intruder, in order to prevail against a suit founded on a prior actual possession, must assume the burden of proof and by his proof overcome the presumption of law attending the plaintiff.

> Christy vs. Scott, 14 How., 282.
> Fuller vs. Fletcher, 44 Fed., 34.
> S. C., 120 U. S., 534.
> Sharon vs. Tucker, 144 U. S., 533.

The same principal of law which protects a possession from intrusion by a trespassing individual protects it against capricious intrusion by the gov-

ernment. Neither the government nor any individual can, without proof and arbitrarily, deprive a citizen of either a chattel or a field in his possession.

Sedg. & Wait, on Trial of Title to Land, Sec. 192.

> "By common law the king has no right of entry on land which is not common to his subjects—the king is put to his inquest of office, or information of intrusion in all cases where a subject is put to his action; their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to the land, he can not acquire it without office found so as to annex it to his domain. Such, too, seems to be the law of Spain, in the Floridas and Cuba, as appears in the case of Arredondo," etc.

Mitchell vs. United States, 9 Pet., 72.

But the court below has another, and a portentiously grave objection to the confirmation of this grant as a perfect grant. In its opinion it says that the petitioner produced no evidence of

> "claim of ownership, notoriety of the grant, and knowledge of its existence in the community or by the oldest inhabitants."

Now as to proving or defeating a grant of land by the production or non-production of evidence of such character under any circumstances, and especially

in this case in which the court had admitted in evidence the protocol of grant made in 1728, produced from the archives of the government, no court in Christendom, nor even a court of *pied poudre,* which Blackstone tells us was the [illegible] of all courts, until the advent of the Court of Private Land Claims, has presumed to promulgate such a rule of evidence and proof.

How wise was the dictum of Lord Halifax which he applied to the honest, incorruptible judges of the Court of Kings bench under the last Stuarts,

> "If it is true that the wisest men make laws, it is as true that the strongest do oft interpret them."

But to seriously consider these alleged rules of proof of title, and with the further purpose of demonstrating that the Court of Private Land Claims, in this particular, also, has misconstrued the laws of Spain, we shall quote from the opinion of Saavedra, the auditor of war, to the governor of Florida, which was approved by the latter as a correct exposition of the laws under which title to the royal lands was acquired in the colonies of Spain. This opinion has been cited with approval in United States vs. Wiggins, 14 Pet., 251, and in United States vs. Delespine, 15 Pet., 333. It is to be found in 2 White's Recop., 283, et seq.

The fourth inquiry propounded was the following:

> "In what situation will those be, who, holding these titles of proprietorship, may

not have complied, or do not continue to comply, with the conditions prescribed by the royal orders respecting the donations of land, the principal object of which has always been cultivation, and under which they have always been granted to them? (2 White, 274.)"

To this inquiry Saavedra responded:

"Those have titles of proprietorship who have complied with the conditions pointed out to entitle them to them, or have obtained them as a remuneration for services or other considerations deemed by the government sufficient for the purpose; in these cases there is a precise obligation to respect such titles."

The fifth inquiry was:

"Have those who are provided with such titles, or others, power to alienate the lands which have been granted to them?"

The reply to this was as follows:

"The 1st law, 12th chapter, 4th book of the Digest of the Laws of the Indies, which treats of the distribution of lands to settlers, says that they having made their dwelling place and tillage, and resided in the settlements four years, the power is granted them from thenceforward to sell and make use of them freely at their will as a thing of their own; consequently, all those who have

merited the title of proprietorship with the useful and direct dominion, are authorized to alienate the lands granted to them."

The sixth inquiry was the following:

"Can these individuals allege any right, who, in virtue of legal titles of proprietorship, took possession of the lands assigned to them, cultivated them for some time, and afterwards left them and suffered them to remain uncultivated, when no cause existed in the province to prevent their returning to them?"

To this inquiry Saavedra replied:

"Those individuals who have taken possession of the lands granted to them, and have acquired the title of proprietorship by the process of time and prescribed conditions, are true proprietors and owners to dispose of the lands as best suits them, although after that they may not have cultivated them, as from the moment they are provided with the title they are exempt from conditions. Those who may have cultivated the lands for some time, and afterwards separated themselves from them, leaving them uncultivated without having obtained the title of proprietorship, shall be subject to the decision of a judicial sentence, in which, after hearing the parties, justice may be done."

The court below, in its opinion, continues:

"Upon consideration of the state of facts presented the court has reached a conclusion which may be briefly stated. The first question arising is, What is the character of this grant, whether perfect or imperfect? It is claimed by petitioner to be a perfect grant, and therefore could be brought into this court at any time, or not at all, under the statute. Inasmuch as this grant was made at the date mentioned, 1728, it falls under the requirements of the Royal Ordinance of 1754, which provides that all grants made subsequent to 1700, unless already confirmed by royal order of the king, or his viceroy, or presidents of the audiencias of the several districts embracing the lands granted, should apply for such confirmation as a *prerequisite to validity*. There is no evidence in this case, either by the documents presented or otherwise, that these requirements of the ordinance of 1754, were ever complied with. Nor is there in the nature of the case or upon any of the facts in evidence any grounds that will justify a presumption of such compliance with the requirement for confirmation. It, therefore, follows that this must be held to be not a perfect but an imperfect grant."

Pascal, in the first of his Provincial Letters, asks whether the five Jansenist propositions condemned by the Sorbonne at Paris are really to be found in the writings of Jansen, and, in showing that they are not,

he satirically observes that mankind have become too skeptical to dispense with the evidence of their eyesight for the existence of visible objects. The age of skepticism has not yet passed, and, with all due deference to the court below, we must decline to accept its decision, that the Royal Regulations of 1754 contain any provision under which this grant must have been presented to the governor of New Mexico for confirmation as a "prerequisite to validity;" or that in default of the grantees proving such presentation and confirmation, the grant became *ipso facto* transmuted from a perfect into an imperfect grant, without first examining for ourselves the provisions of the law.

The fifth article of the Royal Regulations of 1754 in which the court proposes to find these provisions, reads as follows:

> "The holders of land sold or adjusted by the several deputies from the year 1700 up to the present time, shall not be molested, interfered with nor denounced, now, nor at any time, if it appears they have been confirmed by any royal person, or by the viceroys and presidents of the audiences of the several districts *in the time when this requirement was in force;* but those who hold them without this necessary requisite shall apply for the confirmation thereof to the audiences in their district and to the other officers to whom the power is given by these new instructions."

From the preamble to the regulations it appears that prior to the year 1735 the king did not in person

confirm grants of land made in New Spain, so that the power of making and confirming such grants, or in other words of making perfect grants, was vested in the viceroys and governors. We have already shown that the governor of New Mexico was appointed by the king and not by the viceroy of Mexico; hence no confirmation by the latter was requisite to a grant made by the governor, the personal representative of the king. Further, this article specifically limits the requirement for such proof of lawful possession to "the time when this requirement was in force," that is, the time when it was obligatory that grants should be confirmed by the king in person, which in New Mexico was between November 24, 1735, when the Royal Instructions requiring all grants made in New Spain to be forwarded to the king for his approval were promulgated, and October 15, 1754, the date of the Royal Regulations, by which the Royal Instructions were repealed.

Furthermore, the said article provides that grants similar to the one to Leyva, in fact, all those made in New Mexico between 1700 and 1735.

> "shall not be molested, interfered with, nor denounced, now, nor at any time."

The fact that the United States, on the hearing, did not attempt to establish the denouncement and forfeiture of this grant; and that continual and uninterrupted possession of the land granted from 1728 to 1782 was proven by the petitioner, is conclusive proof that the grant to Leyva had not been "molested, interfered with, nor denounced" under the regula-

tions of 1754, and that, therefore, it was a perfect grant and not within the purview of the law.

The court below further finds in these regulations a provision by which a perfect grant title is transmuted into an imperfect one as the penalty for failure to comply with its provisions. That is, if the grantee failed to present his grant for confirmation, it became, if a perfect grant, imperfect; if the grant was imperfect, it so continued; and in either event the grantee, as in the case, remained in possession of the royal lands.

There is no such provision in these regulations, and the court below refrains from indicating in what portion of them it is to be found. The regulations are particular as to the penalty to be imposed for the breach of the law, which by the third article is stated to be that the possessors of the royal lands

> "shall be deprived of and ejected from such lands, and grants of them made to other persons, if they fail to exhibit their warrants within the limited time, without just and proper cause."

Here we have specifically stated the mischief, the remedy and the mode of enforcing the latter—the mischief, the possession of the royal lands without a just title; the remedy, deprivation of and ejection from their lands, and the re-granting of them to another; the mode of procedure, judicial proceedings before designated officers.

In Schulenberg vs. Harriman (21 Wall., 44-63) the Supreme Court say:

"In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent; if it be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property, or that it be offered for sale or settlement."

1 White's Recop., 726.

2 Ib., 52, 274-282.

Mitchel vs. United States, 9 Pet., 743.

Galveston vs. Texas, 31 Tex., 596.

Brownsville vs. Basse, 36 Tex., 500.

Ferris vs. Coover, 10 Cal., 589-615.

United States vs. Repentigny, 5 Wall., 211-288.

Hornsby vs. United States, 10 Wall., 240.

The United States, on the hearing, made no attempt to prove the denouncement and forfeiture of this grant under the Royal Regulations of 1754. The court, in its opinion, makes no allusion to such a procedure, the only mode by which the title to Leyva could have been lawfully devested. It is content with the bald statement that the grant

> "must be held to be not a perfect, but an imperfect grant,"

and in the concluding sentence of its opinion gives effect to its decision by saying:

> "And as such imperfect grant it is subject to the provision of the creating, this court requiring the petition for confirmation herein to be filed within two years, but since this case was not brought or filed in this court until the present year, we must hold that it is buried by the statute of limitations, and hence must dismiss the case for want of jurisdiction under the statute."

The court below again attempts to shift the burden of proof from the United States to the petitioner; it alleges the non-compliance with a condition in the nature of a condition subsequent, and then demands that the grantee should prove its fulfillment. In its opinion it says:

> "Nor is there in the nature of the case, or upon any of the facts in evidence, any grounds that will justify a presumption of such compliance with the requirement for confirmation."

The questions at issue in this suit were not whether the grantee justified his possession under the regulations, but whether these required that he should do so; and herein the burden of proof rested upon the United States; not whether he was con-

firmed in the possession of his land, but whether his possession was denounced and forfeited, and the land regranted to another; and, again, the burden of proof was upon the United States, the grantee having retained possession of the land granted, under Spain and Mexico, from 1754 to 1782, and presumptively to this time.

In view of this continued, peaceable, uninterrupted possession, which the court below, in its opinion, wittingly or unwittingly, admits, every intendment and presumption of the law must be, that the requirements of the regulations were complied with by the officers of the kingdom of Spain and by the grantee.

In direct contradiction to the decision of the court below, the Supreme Court says in Gonzales vs. Ross (120 U. S., 605-622):

> "All favorable presumptions will be made against the forfeiture of a grant. As said before, it will be presumed until the contrary be shown, that a public officer acted in accordance with the law and his instructions."

Again, the court says in United States vs. Noe (23 How., 312, affirming United States vs. Kingsbury, 12 Pet., 476):

> "The court will liberally construe the performance of conditions precedent and subsequent in such grants. It has not, nor will it, apply in the construction of such

conditions in such cases the rules of the common law."

The Supreme Court of Texas says in Cavazos vs. Trevino (35 Texas, 133-165):

> "It is fairly to be presumed from the long-continued possession of the appellees, under both the Spanish and Mexican government, disturbed by no action of the political authority, and questioned by no adverse claimant until so late a day, that the grant was in all respects regular and legal."

In Spanish and Mexican grant cases the courts have uniformly presumed that the officers of the former government, who could at least read the laws of the country in the Spanish language, acted in conformity with them. In this suit it must be presumed that the proper officer decided that the grant to Leyva was not within the purview of the regulations of 1754, or, if it was so held to be, that it was by him confirmed. The United States proved no denouncement and forfeiture: the grantee proved continuity of possession. Whatever presumption is entertained, it is binding upon this government.

In Hardiman vs. Herbert (11 Texas, 656-660) the court says:

> "When questions were fairly submitted to the former authorities of the country upon the construction of their laws, we have never undertaken to sit in judgment upon

their action as a revising court authorized to entertain appeals from their actions and adjudications. On the contrary, where questions were thus submitted and decided, we have held their actions and adjudications, as to rights acquired under them, conclusive upon all questions properly within their cognizance, when not affected by any question of intentional fraud, or the unauthorized usurpation of authority."

Holliman vs. Peebles, 1 Texas, 673.
Edward vs. James, 7 Texas, 382.
Cavazos vs. Trevino, 35 Texas, 165.
Halleck's International Law, 112.
Wheaton's International Law, 161.
Wilcox vs. Jackson, 13 Pet., 575.
Elmendorf vs. Taylor, 10 Wheat., 152.

In the last cited case, Chief Justice Marshall, in his usual comprehensive and emphatic language, says:

"No court in the universe which professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France, or any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal to correct such misunderstandings."

The court, in its opinion, further says:

"That this grant must be held to be not a perfect, but an imperfect, grant."

This was the penalty which the court, not the royal regulations of 1754, attached to this grant. The court does not inform us where in the regulations such penalty is prescribed. It does not inform us where, or by what officer, the penalty was imposed, nor the effect of it when imposed. In the imposition of this penalty the statute, in its workings, must have been automatic. Further, as will be shown under the third point, the Court of Private Land Claims has decided that the regulations of 1754 were repealed in 1819, therefore, the power to impose a penalty under its provisions could not thereafter have been exercised by the governor of New Mexico, and much less by the courts of the United States, after the cession of the territory.

The impossibility of this construction of the Royal Regulations becomes manifest if we consider it was an imperfect grant under the laws of Spain.

In Hancock vs. McKinney (7 Tex., 449), the court says:

> "The distinction between a perfect and an imperfect title, by the laws of Spain, has been repeatedly recognized by this court; and what constituted an imperfect title was fully considered and determined in the case recently decided, of Paschal vs. Perez (Ib., 368), where the court says: 'An imperfect title is one which requires a further act of the granting power to pass the fee in the lands, which does not convey full and absolute dominion, not only against all private persons, but as against the government,

and which may consequently be affirmed or disavowed by the granting authority. The fact, that a final title had conditions annexed to it, did not by the laws of Spain render it an imperfect title. When the conditions were not precedent but subsequent, and the final title had issued, or the final act of confirmation had been performed by the proper authority, the title was perfect. This may be seen by reference to the case of Menard's Heirs vs. Massey, 8 How., 203, the form there transcribed by the learned judge is given as an example of a perfect title under the laws of Spain, and yet there are conditions annexed to it to be performed by the grantee, upon the non-performance of which the right would be subject to forfeiture.' "

Under the laws of Spain imperfect titles were not conferred by way of punishment, and it is not conceivable in what manner a penalty was imposed in this case, if in the automatic transformation of the perfect title of 1728 into the imperfect one of 1754, there was no deprivation of the possession of the land granted. How, and when, and under what conditions this penalty was to have been imposed under the Royal Regulations, the court does not inform us. It rested with the granting power to disavow an imperfect grant title, but if disavowed, both the title and the possession under it terminated. If this grant simply became imperfect, what further act of the granting power was necessary to retransmute Leyva's imperfect title of 1754 into his perfect title held from

1728 to that date? The court does not enlighten us, but from its decision, the law of prescription could have no curative effect; the title must to the end of time remain imperfect. It is said that Joshua, the son of Nun, suspended the laws of nature by causing the sun to stand still upon Gibeon and the moon in the valley of Ajalon, so that his enemies might be annihilated; and the court below would seem to have suspended, in its turn, all the written and unwritten laws of Spain, Mexico and the United States, so that this title might be destroyed.

On December 4, 1786, the king promulgated his Ordinance of Intendants (2 White's Recop., 67, 496; Reynold's Comp., 59), by which a change in the mode of government in New Spain was instituted. The governor of New Mexico, by the tenth article (Reynolds, 60), retained the powers he had theretofore exercised. The Royal Regulations of 1754 were re-enacted, and the intendant, and, in New Mexico, the governor, were instructed to again examine into the possession by which the royal lands were held.

There is no proof in this suit, except by presumption based on continuity of possession, that the legal representatives of Jose de Leyva ever justified their possession under this ordinance. What character, then, did their title and possession assume under the rulings of the Court of Private Land Claims? Having become imperfect because of the presumed failure to comply with the provisions of the Royal Regulations of 1754, did it become a plusque imperfect title by the to be presumed additional failure of the grantee to conform to the ordinance of 1786?

The remarkable fact, however, is, that the legal representatives of the original grantee continued in peaceable and uninterrupted possession of the land grant until the territory was ceded, in 1848, to the United States.

From the foregoing statement of fact and law, it is submitted that the following conclusions must be drawn:

That the grant to Leyva, made in 1728, was a perfect grant when made. That the governor of New Mexico then had the power to both make and confirm grants of the royal lands.

That if any conditions, express or implied, were annexed to the grant, they were conditions subsequent which did not affect the title or possession, though from non-fulfillment of them a disfeasance might occur.

That Leyva was not obligated to present his grant for confirmation under the regulations of 1754, it having been, in 1728, made and confirmed by lawful authority.

That if he was so obligated, the presumption that he had complied with the requirements of the regulations would necessarily arise from the continued possession of the lands of his grant.

That the laws of Spain and the regulations of 1754 provided but one method by which a grantee could be deprived of his title and possession, and that was by forfeiture based upon a formal denouncement.

No such denouncement and forfeiture having been proven by the government, the legal representa-

tive of Leyva is now in lawful possession of the land granted to his ancestor in 1728.

That there was no mode, either by the laws of Spain or under the regulations of 1754, by which a title could be transmuted from a perfect into an imperfect title, as is in this case attempeed by the Court of Private Land Claims.

III. The grant to Leyva having been a perfect grant when made in 1728, and when the territory of New Mexico was ceded to the United States in 1848, the Court of Private Land Claims had no jurisdiction over it.

The jurisdiction of the Court of Private Land Claims is conferred by the sixth section of the statute by which it was created. (26 Stat., 854.) By that section it is made obligatory upon claimants to land granted by Spain and Mexico in the territory ceded by Mexico to the United States

> "which were not already complete and perfect"

to present their claims to the court by petition in writing.

By section seven of the statute it is further provided

> "That all proceedings subsequent to the filing of the said petition shall be conducted as near as may be according to the practice of the courts of equity of the United States."

The confirmation or rejection of the grant claim was to be by final decree from which an appeal was given to this court.

But the jurisdiction thus conferred upon the Court of Private Land Claims was not a general equitable jurisdiction designed to supply the deficiencies in the titles conferred by Spain and Mexico which were in their incipient state at the cession of the territory to the United States. The statute, as construed by the Supreme Court, restricted the jurisdiction of the court below to a class of grants which were not equitable save in this, that the United States, as the successor of Spain and Mexico, held the legal title to the land granted in trust for the grantee.

In United States vs. Sandoval, 167 U. S., 278-293, the court say:

> "In Ainsa vs. United States, 161 U. S., 208-223, attention was called to the act of May 3, 1851" to ascertain and settle private land claims in California) "and it was said: 'But, under the act of March 3, 1891, it must appear, in order to the confirmation of a grant by the Court of Private Land Claims, not only that the title was lawfully and regularly derived, but that if the grant were not complete and perfect, the claimant could, by *right and not by grace,* have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States.'"

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"This was affirmed in United States vs. Santa Fe, 165 U. S., 675-714, and Mr. Justice White, speaking for the court, said:

"An inchoate claim, which could not have been asserted as an absolute right against the government of either Spain or Mexico, and which was subject to the uncontrolled discretion of congress, is clearly not within the provision of the act of March 3, 1891, c. 539, creating the Court of Private Land Claims (26 Stat., 854), and therefore is beyond the reach of judicial cognizance. The duty of protecting inperfect rights of property under treaties such as those by which territory was ceded to the United United States in 1848 and 1853, in existence at the time of the cessions, rests upon the political and not the judicial department of the government (Le Bois vs. Brammell, 4 How., 449-461; Ainsa vs. United States, 161 U. S., 208-222), to the extent that only Congress has vested them with authority to determine and protect such rights, can courts exercise jurisdiction. When, therefore, a tribunal of limited jurisdiction is created by congress to determine such rights of property, a party seeking relief must present for adjudication a case clearly within the act, or relief can not be given. United States vs. Clarke, 8 Pet., 436-444."

Hence the only imperfect Spanish and Mexican grant claims of which, under the statute, the Court

of Private Land Claims could take cognizance, and, necessarily, concerning which it could make a final decree of confirmation or rejection, were those in which the petitioner could *by right* have demanded that it should be made perfect by the former government. The court below had, in effect, no equitable jurisdiction; its decrees of confirmation determined no equities; they were to be but the equivalent to the final act of grant by the former government—the conferring of the patent, the evidence of title, which it was the duty of the executive authority of Spain or Mexico to have issued before the cession of the territory.

The Supreme Court by its decision in the cases above cited, following the statute, expressly excluded from the jurisdiction of the court below, created by the statute a court of equity, the element of grace, the foundation of all equity (Pom. Eq. Juris., 1, Sec. 33). The jurisdiction of that court was by the statute to be limited to cases of "imperfect" grant titles, which, necessarirly, were equitable titles, protected, however, as vested interests equally with all other titles by the treaty of cession, and yet the court below had conferred upon it no equitable powers to supply the deficiencies of such titles, which were in their incipient state at the time of the cession of the territory.

Imperfect titles under the statute were, as we have seen, of two classes:

First—Grants where the claimant could have, as a matter of right, demanded of the former government to perfect the grant.

Second—Grants where such action could only have been asked as a matter of grace.

The Supreme Court has nowhere defined, in cases arising under the said statute, these two classes of grants, and, therefore, we attempt the following definitions:

Grants of the first class were those in which the grantee had fulfilled all the conditions precedent, and, in consequence, the government held the legal title in trust for him until the issuance of the final paper of grant. Grants of the second class were those in which something remained to be done by the government or its officers to perfect the title.

This further action of the government, unless it simply involved the approval of the juridical possession given, or some other act required by law of the officers of the government, must necessarily have been dependent upon the further action of the grantee; for the perfecting of his grant must have been dependent upon the performance by him of conditions precedent. If the conditions had been subsequent, the title of the government would have passed, and could only have been resumed by denouncement and forfeiture.

In United States vs. Santa Fe, supra, the court say:

> "When, therefore, a tribunal of limited jurisdiction is created by Congress to determine such rights of property, a party seeking relief must present for adjudication a case clearly within the act, or relief can not be given."

Therefore, the first question for the Court of Private Land Claims to determine on the hearing in each case was, Can the court grant the relief asked? Or, in other words, Has the court jurisdiction of the subject-matter? If not, then the plain duty of the court was to dismiss the petition for want of jurisdiction and not to assume jurisdiction to adjudicate by final decree a grant claim of a character in which it could grant no relief.

In Ex Parte McCardle, 7 Wall., 512-514, the court decided against its jurisdiction in the case presented, and held that, therefore,

> "it is useless, if not improper, to enter into any discussion of other questions."

The court further said:

> "Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause, and this is not less clear upon authority than upon principle."

In Decatur vs. Paulding, 14 Pet., 600, the court say:

> "The authority to decide causes at all, and not the decision rendered therein, is what makes up jurisdiction."

In Applegate vs. Lexington, etc., Mining Co., 117 U. S., 255-267, the court further say:

> "The power to hear and determine a cause is jurisdiction. If the law confers the power to render a judgment or decree, then the court has jurisdiction."

If the Court of Private Land Claims could not grant the equitable relief prayed for in the petition, it could make no final decree affecting the claim of title. The subject-matter was not confided to it by congress, which, having the sole disposal of the public domain, reserved to itself the final disposition of the equities of the grant claim.

What would be the legal effect of a decree of that court adjudicating as imperfect or invalid a grant title over which it had no jurisdiction under the statute creating the court? Clearly, upon principle and precedent, such decree would be null and void. Yet we find that court, in one case at least, exercising jurisdiction over a case in which it could grant no relief, and determining equities, the determination of which congress had still reserved to itself.

In Cesna vs. United States, 169 U. S., 165-187, the court say:

> "In other words, it (the United States) took that territory bound to respect all rights of property which the Mexican government respected, but under no obligation to right wrongs which that government had theretofore committed. But even if there were any obligation on the part of the government, either under the general rules of

international law or the terms of the treaty of cession, to recognize the plaintiff's claim to this particular tract, yet the time, manner and condition of enforcing it would depend upon the will of Congress. And in creating the Court of Private Land Claims, Congress has prescribed the character of claims which that court may determine and the conditions which must attach to any claim which it may enforce. *This claim, even if the grant in its inception was valid, was not one which it was within the province of the Court of Private Land Claims to approve and confirm.*"

If the court had no jurisdiction to approve and confirm, or, in other words, to grant relief, what jurisdiction had it? And what power to make and enter a final decree determining the validity of the title? If the claim was not one within the province of the court, it must have been one the equities of which congress still reserved for its own determination.

The wrong done to grant claimants under Spain and Mexico by the Court of Private Land Claims assuming to exercise jurisdiction over cases not confided to it by congress will become manifest by reference to some decisions of the Supreme Court, made upon what it states to be principles of both civil and international law, which involved the title to lands ceded to the United States under the Louisiana and Florida treaties, and to lands in California ceded under the treaty with Mexico—all these titles emanating from Spain or Mexico.

In the United States vs. Arredondo, 6 Pet., 691, it appeared that the grant to Arredondo was for four leagues square, and made as a present grant from its date, with the subsequent condition that the grantees should settle and improve the land in three years, and, in failure, the grant should become void; further, that they should settle on it two hundred Spanish families; but no time was fixed for the performance of this condition. Possession was taken and improvements made within three years, but the families were not settled when the country was ceded. The Supreme Court declared, upon general principles of equity, that after the cession of Florida to the United States, the condition of settling Spanish families had become impossible by the acts of the grantor, the government of Spain, and certainly immaterial to the United States; therefore, the court held, the grant was discharged from the unperformed conditions and single.

This decision rests not only upon general principles of equity, but also upon the principles of the civil and international law.

Vattel, Law of Nations, V. 1, 6, 19; sections 210, 244, 245.

Ib., V. 2, 6, 7, Sec. 80.

Hall's Mexican Law, Sec. 2481.

Ferris vs. Coover, 10 Cal., 614.

Notwithstanding that section seven of the statute constituting the Court of Private Land Clams includes among the prescribed rules of determination the law of nations and the laws and ordinances of the government from which the grant was derived, yet if

a similar grant had been made in New Mexico, and a claim to it had been submitted to that court, clearly, under the above cited decisions of the Supreme Court, that court would have had no jurisdiction to approve and confirm the grant, and consequently would have had no jurisdiction to annul the grant by its decree. An examination, however, of the various decisions of the Court of Private Land Claims can leave no doubt but that that court would have assumed and exercised jurisdiction, would have reversed the decision of the Supreme Court in the Arredondo case, and would have assumed by its final decree to annul the grant.

It may be that the court would have based its decision upon the eighth paragraph of section thirteen of the statute constituting the court, which reads thus:

> "No concession, grant or other authority to acquire land, made upon condition or requirement, either antecedent *or subsequent*, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and in the manner stated in any such concession, grant or other authority to acquire land."

This paragraph would seem to contemplate that this court of equity, the Court of Private Land Claims, in determining the validity or invalidity of a grant with conditions subsequent annexed, should be governed by the strict rule of law, and inhibited from deciding the case under the rule of *cy pres* or the general principles of equity.

No one will deny to the legislative power the authority to change by statute a rule of evidence, but

there is always this limitation upon the exercise of that power, that such change shall not affect or devest vested rights of property.

The consideration of this question, however, is not very material at this point, for the Supreme Court, in the cases above cited, has limited the jurisdiction of the Land Court to cases in which grant claimants could by right, and not by grace, have demanded that the grant should be made perfect by the former government, had the territory not been acquired by the United States (Ainsa vs. United States, supra), and this category could not have included grants in which the conditions subsequent had not been fulfilled, unless the court below should regard such grants as perfect grants, subject to a defeasance, as the Supreme Court has hitherto done. If, however, the Land Court should assume the authority to apply such rule of evidence to grants of that class, such action could but operate to work a forfeiture of lands granted by Spain and Mexicco, and that, too, in cases where the former governments had never attempted to exercise that power, the exercise of which, moreover, had been waived by this government by the treaty of cession.

In Menard's Heirs vs. Massey (8 How., 293-314) the court, in referring to perfect grant titles under Spain, say:

> "For a more perfect understanding of the manner in which a complete title under the Spanish government was executed, the form of such a title, translated from the Spanish, is hereunto annexed."

An examination of the given form of a perfect grant will show that it was subject in express terms to numerous conditions subsequent, which are therein referred to as being embodied in articles 3, 4, 6, 7 and 9 of the regulations of July 17, 1799. (2 White's Recop., 235.)

Numerous other cases might be cited from the opinions of the Supreme Court, but they would only reiterate the decisions of the court which we have cited, that when the government of Spain or Mexico made a grant of land subject to conditions subsequent the whole title of the government passed, and consequently could only be resumed by proceedings in denouncement and forfeiture.

The question of the jurisdiction of the Court of Private Land Claims presents itself in another and more important and serious aspect for the interests of the grant claimants in the consideration of the decisions of the Supreme Court respecting lands granted by Spain and Mexico in what is now the state of California.

New Mexico and Arizona, together with California, were acquired by the United States from Mexico by treaty of purchase and cession. The rule of property must have equally applied to lands situated in either the one or the other of these territories, which were at all times alike subject to the same supreme law. What, under that law, was a vested right of property in one territory must have been a vested right in the others; and what the Supreme Court have decided was a vested right of property in California must, in similar cases, be held to be a vested right in New Mexico and Arizona.

One of the leading California cases is that of Fremont vs. United States, 17 How., 667. In that case the grant was made subject to conditions, which the court held were conditions subsequent, and confirmed the grant.

In the case of Hornsby vs. United States, 10 Wall., 224-240, the confirmation of the grant was opposed by the United States because it was alleged that there was no proof that the conditions subsequent of the grant had been fulfilled. The court say, on page 240:

> "The interest acquired by the grantee could not be devested under the Mexican law, any more than at common law, upon mere allegations and surmises. Some formal and regular proceedings were required to effect such devestiture, and under the Mexican law these had their inception in what is termed a denouncement, by a party desirous of obtaining the land. An investigation then followed, whether or not the conditions had been complied with, or so disregarded as to justify a decree of forfeiture. Without such inquisition and decree, the title did not revert to the government, nor was the land subject to be regranted. The object of the colonization laws and regulations of Mexico was the settlement of the vacant lands of the republic; and grants were usually made to accomplish this purpose without other consideration. But the public, as observed in the Fremont case, 17 How., 561, had no interest in forfeiting them even in these cases,

unless some other person desired and was ready to occupy them, and thus carry out the policy of extending its settlements.

"There having been no forfeiture of the grantor's interest in the present case, nor any such disregard of the conditions annexed to their grant as to have justified a forfeiture, the claimants under the grant are entitled to a confirmation. The interest which passed by the grant, whether it be regarded as a legal title, imperfect in its character, and to be perfected by a subsequent official survey and segregation of the quantity designated, or as a mere equitable or inchoate title, constituted property which the United States was bound to protect by the stipulations of the treaty of cession. That treaty provides for the protection of the rights of property of the inhabitants of the ceded territory. And, independent of the treaty, they were entitled to such protection by the law of nations, according to which, as was said by this court in Strother vs. Lucas (12 Pet., 436), 'the rights of property are protected even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect.'

"By the term property, as applied to lands, all titles are embraced, legal or equitable, perfect or imperfect. It was so held by this court in the case of Soulard vs. United States (4 Pet., 511), when considering the

import of the term in a stipulation contained in the treaty by which Louisiana was acquired, providing that the inhabitants of that territory should be protected in the enjoyment of their property. 'It comprehends,' said the court, 'every species of title, inchoate or complete. It is supposed to embrace those rights which are executory as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away.'

"It follows from the views that we have expressed that the appellants possessed, under the grant in this case, at the date of the cession of California to the United States, a right of property in the land granted, and, as a consequence, that their claim is valid and should be confirmed."

From these decisions and many others of a similar character which are to be found in the reports, we may deduce that when in grants of land made by Spain or Mexico there were conditions subsequent annexed, the whole title of the government passed; that such title could only be renewed by the government by formal proceedings in denouncement and forfeiture; that when a condition became impossible of fulfillment by the act of the grantor the grant became single; and that if a forfeiture of the land granted had not been declared by Spain or Mexico prior to the cession of the territory, the power to impose it

did not pass to the United States by the treaty of purchase and cession.

These principles of law laid down by the Supreme Court in cases of grants of land under Spain in Louisiana and Florida, and under Spain and Mexico in California, must be equally applied by the courts in the determination of the validity of grants made by Spain and Mexico in the territories of New Mexico and Arizona and in the state of Colorado, because the United States derived their title to all these territories by treaties of purchase and cession from Spain and Mexico, which had been, prior to the cession, subject to the same supreme law.

These decisions distinguish vested rights of property under treaties of cession; they are founded upon principles of law; and such rights are not subject to be devested upon a mere change of the rules of evidence by the legislative power.

Yet it would seem from the various decisions of the Court of Private Land Claims that these principles are not to be applicable if a grant of land, made by Spain or Mexico, should fortuitously have been located within the boundaries of that portion of the ceded territory which is now designated the state of Colorado and the territories of Arizona and New Mexico.

In the case under consideration, assuming that, as the court below decides, the grant to Leyva became imperfect for an alleged non-compliance with the royal regulations of 1754, the question presents itself, Was it such an imperfect grant that

> "the claimant could by right and not by grace have demanded that it should be made per-

fect by the former government, had the territory not been acquired by the United States?"

Until the court below had affirmatively decided that question, it had no jurisdiction over the grant title, and it did not so decide.

The court below would seem to have regarded the provisions of the regulations of 1754 as conditions subsequent, which were to be annexed to every grant in New Spain made subsequent to the year 1700. But, as already shown, conditions subsequent are those which are expressed in the papers of grant, or implied from laws existing when the grant was made. It is difficult to conceive that the provisions of a law promulgated in 1754 could operate upon a grant made in 1728, as a condition subsequent to the validity of the title to the land granted.

The statute creating the Court of Private Land Claims, by the eighth subdivision of section 13, provides:

> "No concession, grant, or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed, unless it shall appear that every such condition and requirement was performed within the time and in the manner stated in any concession, grant or other authority to acquire land."

This provision, in effect, inhibits the court below from perfecting by its decree any and all inchoate

or imperfect grant titles; it limits its jurisdiction to grants in which all conditions, both antecedent and subsequent, had been performed, and to which the former government held the legal title in trust for the grantee. The grant had become perfect, nothing was wanting but the evidence of title—the patent—which had not been issued because of the cession of the territory to the United States.

We have already shown that this provision of the statute requires a court of equity to construe a condition subsequent, according to the strict rule of law, and that this power, in effect, invests the Court of Private Land Claims with jurisdiction to forfeit lands granted by Spain and Mexico, the title to which, under their laws, had passed absolutely and fully to the grantee, for causes which had arisen prior to the cession of the territory.

And in thus forfeiting lands for causes which the former government alone could assert and enforce, the United States is not compelled to prove the non-fulfillment of the conditions subsequent, the breach of which is alleged, as the former government would have been, but the grantee is called upon to prove their fulfillment, thus reversing the established principles and rules of law in such cases, both under the laws of Spain and Mexico, as well as at the common law, and, in effect, calling upon the grantee to prove a negative.

Hancock vs. McKinney, 7 Texas, 384-435.
Hornsby vs. United States, supra.

If any rights of forfeiture or avoidance of grants of land for the non-fulfillment of conditions subse-

quent subsisted in the government of Spain or that of Mexico, they did not pass to the United States by the treaty of cession; on the contrary, that government, by the treaty, released all such rights, and the court below can not, of their own motion, exercise them.

Fairfax vs. Hunter, 7 Cranch, 603-627.
The People vs. Folsom, 5 Cal., 379.
Minturn vs. Brower, 24 Cal., 644-664.
De Merle vs. Matthews, 26 Cal., 456-478.

And most assuredly can not do so, when the law imposing the penalty which the court below seeks to enforce had been repealed by the former government.

In the case of Hays vs. United States, decided by the Court of Private Land Claims at the November term, 1893, the court say:

> "On the 23d day of December, 1818, by resolution of the Council of the Indies, before a full board at Madrid (and approved by the king), it was decreed that all business pertaining to the alienation of the lands in New Spain should belong to the department of the office of the treasury of the Indies at Madrid. Hall, Mex. Law, 76, section 178.
>
> "The royal cedula of October 15, 1754, authorized the governors in distant provinces of Spain to approve grants of land belonging to the crown, but no such power was conferred on the provincial deputations. But all power or authority conferred on the audi-

encias or governors of New Spain by said royal cedula, which were in conflict with the resolution of 1818, was repealed by it."

If the Royal Regulations of 1754 were so repealed as the court below decided, they must be considered, except as to transactions passed and closed, as if they had never existed; and as is said by Chief Justice Hornblower in James vs. DuBois, 16 N. J. L., 285:

> "For acts done or omitted under an existing law, subject to punishment or prejudice; if that law be repealed the offender will escape the penalty."

I submit to the court, therefore, that if we regard this grant as did the court below, as an imperfect grant, that court had no jurisdiction to perfect it, and consequently none to destroy it.

But the petition in this case did not ask for the confirmation of this grant as an imperfect, but as a perfect, grant; and it was filed under the eighth section of the act constituting the Court of Private Land Claims, which provides:

> "That any person or corporation claiming lands in any of the states or territories mentioned in this act under a title derived from the Spanish or Mexican governments that was complete and perfect at the time when the United States acquired sovereignty therein, *shall have the right* (*but not be bound*) to

> apply to said court in the manner in this act provided for other cases for a confirmation of such title; and on such application said court shall proceed to hear, try and determine the validity of the same and the right of the claimants thereto, its extent, location and boundaries, in the same manner and with the same powers as in other cases in this act mentioned."

Herein Congress does not assume the power to confer upon the Court of Private Land Claims, which it created a court of equity, with a limited jurisdiction, the power to hear, determine, and decree upon a perfect title to land, but provides that such jurisdiction may be conferred by the action of the grant claimant.

If Congress, under the Constitution, could not confer such jurisdiction upon a court of equity, it could not be conferred by the consent of parties. Congress can not, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power. If Congress should, by its laws, attempt to devest, or cause to be devested, a title to land secured by treaty, such action would be regarded as void, and would be set aside by the courts.

New Orleans vs. United States, 9 Pet., 736.

The Supreme Court of New Jersey, in School Trustees vs. Stocker, 13 Vroom, 115-117, says:

> "The question here is, not whether a competent court had obtained jurisdiction of a party suable before it, but whether the

court itself is competent, under any circumstances, to adjudicate a claim against the defendant below. This kind of jurisdiction can not be conferred by consent, nor can the right to object to it be lost by acquiescence or neglect.

"A judgment pronounced by a tribunal having no authority to determine the matter in issue, is necessarily and incurably void, and may be shown so in any collateral or other proceeding in which it is drawn in question. * * * * When the tribunal has not jurisdiction over the subject-matter, no averment can supply the defect, no amount of proof can alter the case. * * * * Neither the acquiescence of the parties nor their solicitations can authorize any court to determine any matter over which the law has not authorized it to act."

This objection to the jurisdiction of the Court of Private Land Claims was not made at the hearing of the suit before that court, but is now sought to be made in behalf of one of the defendants below.

It is submitted that such objection can properly be interposed at this time under the rules of equity practice.

In Delafield vs. Illinois (2 Hill, 159-161), the court says:

"It is rarely, if ever, too late to object to the jurisdiction of a court when the want of power to hear and determine appears on the

face of the proceedings. * * * * Thus, an appellant from Chancery to the Court of Errors and Appeals may avail himself in the latter court of an objection to the chancellor's jurisdiction, though it was not made before him, when the objection, if valid, is of such a kind that it could not have been obviated had it been stated at an earlier stage of the proceedings."

If any doubts could be entertained as to the soundness of the views above expressed, they would be resolved by the recent decision of this court in Minnesota vs. Hitchcock, 22 Sup. Ct. Rep., 650-654, where Mr. Justice Brewer, delivering the opinion of the court, says:

"A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on its merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the constitution and the laws. It is the duty of every court of its own motion to inquire into the matter, irrespective of the wishes of the parties, and be careful that it exercise no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it can not invest a court with

jurisdiction which it does not by law possess over the subject-matter."

Before considering the question, whether under the constitution congress have the power to confer upon a court of equity jurisdiction to adjudicate perfect titles to land, it may be well to consider whether, under the treaty of cession of 1848, perfect titles to lands in the ceded territory were not protected by the treaty itself; whether such titles needed any confirmation, legislative or judicial, by the United States, and whether they were not valid under that government as they had been under Spain and Mexico.

The rules of decision for the Court of Private Land Claims are prescribed in the seventh section of the statute constituting the court. They are substantially those embodied in the Florida act, which have been exhaustively considered by Mr. George Ticknor Curtis in his Com. on Jurisd. of U. S. Courts, Vol. 1, 400, et seq. It shall but refer the court to this exposition, and not quote from it, because the question seems to me to have been determined by this court in the case of Ainsa vs. New Mexico and Arizona R. R., 175 U. S., 71-90, in which the court, after reviewing the legislation of congress respecting the judicial determination of land grants within territory derived by cession from Spain and Mexico, say:

> "The result is that the United States, by the act of 1891, have prescribed and defined the only method by which grants, incomplete before the cession, can be completed and made binding upon the United

States; but have neither made it obligatory upon the owner of a title complete and perfect before the cession to resort to this method, nor declared that his title should not be valid if he does not do so.

"A grant of land in New Mexico, which was complete and perfect before the cession of New Mexico to the United States, is in the same position as was a like grant in Louisiana or Florida, and is not one in the position of one under the peculiar act of congress in relation to California; and may be asserted, as against any adverse private claimant, in the ordinary courts of justice."

See also

Chirac vs. Chirac, 2 Wheat., 259-277.
Fletcher vs. Peck, 6 Cranch, 114-135.
Foster vs. Milson, 2 Peters, 253-314.
Baldwin vs. Franks, 720 U. S., 702-713.

If then the grant to Leyva was a perfect grant, and his legal representatives could assert their title in the ordinary courts of justice, such assertion must be by an action at law, and having thus a legal remedy they could not resort for relief to a court of equity, the jurisdiction of which is limited to cases in which there is no remedy at law. Nor could their consent to sue or to be sued in a court of equity, whether established by an act of congress, or of a state or territory, confer jurisdiction upon such court.

Farther, if the local courts had jurisdiction to try the title to the land granted, the United States

had no concurrent jurisdiction because the title to the property originated in a grant by a foreign state within territory subsequently ceded to the United States. The titles to all the lands within the thirteen original states had a similar origin, but that fact has never led the courts of the United States to claim a concurrent jurisdiction over them. As has already been said, congress can not by legislation enlarge the federal jurisdiction, nor can it be enlarged by the treaty making power.

New Orleans vs. United States, 9 Pet., 736.

While it may be true that, with respect to perfect titles to such grants of land, the United States can sue or consent to be sued in a court of equity, yet such procedure would be but in the nature of a bill to quiet title, and for the purpose of determining the boundaries of the land granted, thus separating and distinguishing its area from the mass of the public domain so that the latter might be disposed of by the government, and in no sense would it involve the title to the grant itself.

The constitution of the United States has in express terms recognized the distinction between cases at law and those in equity, and the Supreme Court has in numerous cases announced and enforced it.

The third article of the Constitution and the seventh amendment embrace the provisions by which the judicial power of the United States is defined.

Section 2 of article III reads as follows:

"The judicial power shall extend to all cases in law and equity arising under the

> Constitution, the laws of the United States, and treaties made or which shall be made under their authority."

The seventh amendment to the Constitution reads:

> "In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

By article III the judicial power is restricted to all *cases* in law and equity—and it has been decided that a case arises within the meaning of the Constitution, whenever any question respecting the Constitution, laws or treaties of the United States has assumed such a form, that the judicial power is capable of acting upon it. The power is capable of acting only when the subject is submitted to it by a party, who asserts his rights in the form prescribed by law.

The decisions of this court have in many cases recognized and defined cases at law and cases in equity.

By cases at law, arising under the Constitution, the laws of the United States and treaties are to be understood suits in which legal rights are to be ascertained and determined in contradistinction where equitable rights alone are recognized and equitable remedies are administered.

> Robinson vs. Campbell, 3 Wheat., 212-221.
> Parsons vs. Bedford, 8 Pet., 433-446.

By cases in equity are to be understood suits in which relief is sought according to the principles and practice of the equity jurisdiction as established in English jurisprudence.

Robinson vs. Campbell, 3 Wheat., 212.

United States vs. Howland, 4 Wheat., 108-115.

1 Story Eq. Jurisp., section 57.

3 Story on Const., 500-507.

The test to be applied, therefore, to determine whether a particular case falls within the equity jurisdiction of the courts of the United States, would seem to be, whether there is a plain, adequate and complete remedy at law.

The whole question has been considered in the case of Fern vs. Holme, 21 How., 481-484, in which the court say:

> "By the Constitution of the United States, and by the acts of congress organizing the federal courts, and defining and inviting the jurisdiction of these tribunals, the distinction between common law and equity jurisdiction has been explicitly declared and carefully defined and established. Thus in section 2, article III of the Constitution it is declared that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, etc.
>
> "In the act of congress 'to establish the judicial courts of the United States,' this dis-

tinction of law and equity powers is frequently referred to; and by the tenth section of that act, as if to place the distinction between those powers beyond misapprehension, it is provided 'that suits in equity shall not be maintained in either of the courts of the United States in any case when plain, adequate and complete remedy may be had at law,' at the same time affirming and separating the two classes or sources of judicial authority. In every instance in which this court has expounded the phrases, proceedings at the common law and porceedings in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law and defined and enforced by the Court of Chancery of England."

On page 486 the court further say:

"In the case of Parsons vs. Bedford, 3 Pet., 446-447, this court, in speaking of the seventh amendment to the Constitution, and of the state of public sentiment which demanded and produced the amendment, say:

"The Constitution had declared in the third article that the judicial power shall ex-

tend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made or which shall be made, under their authority, etc. It is well known that in civil suits, in courts of equity and admirality, juries do not intervene, and that courts of equity are the trial by jury only in extraordinary cases. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that the distinction was present in the minds of the framers of the amendment. By common law they meant what the Constitution denominates in the third article law, not merely suits which the common law recognized among the old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies administered.

"The same doctrine is recognized in the case of Strother vs. Lucas, 6 Pet., 768-769; in Parish vs. Ellis, 16 Pet., 453-454. In Bennett vs. Butterworth, 11 How., 669, the chief justice says:

"'The Constitution in creating and defining the judicial power of the general government, establishes the distinction between law and equity, and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State Court.

> But if the claim be an equitable one, he must proceed according to the rules which this court has prescribed, regulating proceedings in equity in the courts of the United States.'"

The refusal of congress to confer upon the Court of Private Land Claims, a court of purely equitable jurisdiction, a jurisdiction over perfect grants of land within the ceded territory, must be referred to the provisions of the Constitution respecting the judicial power of the general government, as construed by this court, and the attempt to confer jurisdiction by consent of parties to a misconstruction of those provisions.

While I can not doubt but that this court will reverse the decree of the court below, and find the grant to Leyva to have been a perfect grant, yet I most respectfully ask that the question of the jurisdiction of the Court of Private Land Claims over perfect grants be now passed upon.

We have, under the decisions of this court, our remedy in the local courts of the Territory of New Mexico, and that remedy is at law. We are, under the Constitution, entitled to a trial by a jury of the vicinage; and in an action of ejectment against the American Turquoise Company, the nature of our title, and the boundaries of the grant would be determined, and thus this tract of land would be separated from the general body of the public domain and every purpose will be accomplished for which the Court of Private Land Claims was created.

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